Supreme Court, U.S.
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No. ——

In the Supreme Court of the United States

MARC HOUK, Warden,

Petitioner,

v.

RICHARD JOSEPH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JIM PETRO
Attorney General of Ohio

STEPHEN P. CARNEY*
State Solicitor
**Counsel of Record*
ELIZABETH T. SCAVO
Assistant Solicitor
CHARLES L. WILLE
Assistant Attorney General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Petitioner

QUESTION PRESENTED

In granting habeas corpus relief, did the Sixth Circuit misapply settled rules that limit its role and authority and erroneously set aside reasonable state-court determinations of fact?

LIST OF PARTIES

The Petitioner is Marc C. Houk, the Warden of the Ohio State Penitentiary. (Ralph Coyle, Respondent-Appellee Below, was the former warden at the Mansfield Correctional Institution, where Ohio's death-sentenced prisoners had previously been held.)

The Respondent is Richard Joseph, an inmate at the Ohio State Penitentiary.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Marc C. Houk, the Warden of the Ohio State Penitentiary, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion, *Joseph v. Coyle*, 469 F.3d 441 (6th Cir. 2006), is reproduced at App. 1a-57a. The Order and Opinion of the United States District Court for the Northern District of Ohio is reproduced at App. 58a-280a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its opinion on November 9, 2006. The Warden timely filed this petition and invokes the Court's jurisdiction under 28 U.S.C. 1254(1) (2003).

INTRODUCTION

On the evening of June 26, 1990, Ryan Young, a sophomore at Bath High School in Allen County, Ohio, went to his girlfriend's house to watch a movie. He stayed until a few minutes before midnight, when he left to drive home. He never made it. The next morning, discovering that Ryan had not come home, Ryan's parents alerted the police and an extensive search by the authorities ensued. There were no witnesses to his disappearance. Based on information provided by Ryan's girlfriend, investigators identified Respondent Richard Joseph as a suspect. Joseph stated that he was with a friend, Jose Bulerin, on the night Ryan disappeared. On July 4, 1990, investigators searched a sand and gravel pit owned by Joseph's grandparents. They discovered Ryan's body in a shallow grave. He had been stabbed at the base of his skull and in his right flank. Both wounds were lethal. Shortly thereafter Joseph and Bulerin were jointly indicted for the aggravated, capital murder and kidnapping of Ryan Young. App. 9a, 73a.

At Joseph's separate trial, the prosecution presented circumstantial but compelling evidence that Joseph and Bulerin, acting in concert, kidnapped and murdered Ryan. The jury convicted Joseph and sentenced him to death. Joseph appealed his convictions and sentence to the Ohio courts. He claimed, among other things, that the evidence was legally insufficient to sustain the capital specification under which he was sentenced to death, and that corresponding instructions to the jury were erroneous. His trial counsel did not object to the specification or the allegedly erroneous instructions. The Ohio courts rejected Joseph's claims of error and concluded that the evidence against him satisfied constitutional standards. Joseph then filed a habeas corpus petition. Despite the failure of Joseph to comply with state procedures by lodging appropriate objections at trial, the district court granted relief, vacating Joseph's death sentence. The Sixth Circuit affirmed and expanded the district court's grant of relief.

The Court has not hesitated to review and reverse a court of appeals' judgment in habeas corpus, where a concern is present that the court below "set aside reasonable state-court determinations of fact in favor of its own debatable interpretation of the record," and where review confirms that the court "misappli[ed] settled rules that limit its role and authority." *Rice v. Collins*, __ U.S. __, 126 S. Ct. 969, 972 (2006). This case presents the straightforward question whether the Sixth Circuit, in affirming and expanding the district court's grant of relief, exceeded its authority in federal habeas corpus. The Warden maintains that the Sixth Circuit did so, by substituting its own view for that of the state court on a question of state law; by relying on its own dubious precedent in place of the Court's decisions; and by ignoring relevant factual findings by the state courts.

Accordingly, the Warden asks the Court to review and reverse the Sixth Circuit's judgment.

STATEMENT OF THE CASE

On July 12, 1990, the Grand Jury of Allen County, Ohio, jointly indicted Joseph and co-defendant Jose Bulerin on a single count of aggravated murder in violation of Ohio Revised Code 2903.01(B). Ohio law authorizes the death penalty for aggravated murder committed during a kidnapping where "either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design." Ohio Rev. Code 2929.04(A)(7). The indictment included a capital specification which alleged that the aggravated murder was committed while Joseph and Bulerin were committing kidnapping, and that "the offenders were the principal offenders in the commission of the kidnapping." App. 15a.

On July 19, 1990, Joseph's appointed counsel filed several motions on Joseph's behalf, including a motion for a bill of particulars. Counsel did not file a motion objecting to the legal sufficiency or correctness of the capital specification. The case proceeded as a capital prosecution, with the defense filing numerous additional motions pertaining specifically to various procedures and issues pertinent only in capital cases. On December 5, 1990, the prosecution provided a bill of particulars which averred specifically that Joseph fatally stabbed Ryan Young after waylaying Ryan in Ryan's car and forcing Ryan to drive to another location. Jury selection began on January 7, 1991, App. 189a, and the jury trial concluded on January 22, 1991, App. 62a, 93a.

In his final instructions during the guilt phase of the trial, the trial judge described the capital specification as stated in the indictment, namely, that Joseph allegedly killed Ryan during the commission of the kidnapping, and that Joseph and Bulerin were "the principal offenders in the commission of the kidnapping." However, the trial judge

subsequently reviewed the jury form upon which the jury would render its verdicts in writing. The form correctly stated that Joseph was "the principal offender in the commission of the aggravated murder." The defense offered no objections to the instructions and neither the trial judge nor the prosecutor noted the apparent discrepancy in the description of the capital specification. The jury returned findings of guilty on the aggravated murder charge and specification, all twelve jurors signing the verdict form. App. 93a-94a.

A sentencing hearing convened on January 28, 1991. In his preliminary instructions to the jury, the trial judge referred to the aggravating circumstance as described in the specification. However, in his final instructions, the trial judge described the specification indicated in the jury's previous verdict, namely, that Joseph was the principal offender in the aggravated murder. Again, the defense did not object, and neither the prosecution nor the trial judge noted the apparent discrepancy between the trial court's preliminary and final instructions. On January 30, 1991, the jury reached a verdict which recommended a sentence of death. App. 62a. In a written sentencing opinion issued on February 8, 1991, the trial court accepted the jury's verdict. The trial court referred to Joseph as a principal offender in the commission of the aggravated murder. App. 101a.

Upon direct appeal, Joseph claimed, among other things, that the evidence was legally insufficient to sustain the capital specification; that the specification and instructions to the jury were erroneous; that his trial attorneys were constitutionally ineffective in failing to object to the specification and instructions. The Ohio Court of Appeals affirmed Joseph's conviction and sentence and the Supreme Court of Ohio affirmed the judgment of the Court of Appeals. The Supreme Court of Ohio found sufficient circumstantial evidence, including evidence that Joseph had a motive to kill Ryan, from which a reasonable juror could find that Joseph was a principal in the commission of aggravated

murder. The Supreme Court of Ohio held that Joseph waived his challenges to the indictment and instructions by failing to object at trial, and rejected summarily Joseph's related ineffective counsel claim. However, in the course of its review for plain error, the Supreme Court of Ohio held that Joseph had not been prejudiced, given the facts that the jury form correctly stated the capital specification, the trial court read the correct language to the jury, and all twelve jurors signed the verdict form. *State v. Joseph*, 73 Ohio St. 3d 450, 457 (1995).

On July 13, 2001, Joseph filed with the United States District Court for the Northern District of Ohio a petition for a writ of habeas corpus in which he presented, among other claims, his claims of insufficient evidence, erroneous indictment and instructions, and ineffective counsel. App. 124a-127a. The Warden opposed the petition, arguing that the state courts reasonably rejected Joseph's claims of insufficient evidence and ineffective counsel, and that Joseph's remaining claims were procedurally defaulted. On December 22, 2004, the district court issued an opinion and order vacating Joseph's death sentence. App. 279a-280a. The district court rejected Joseph's insufficiency of the evidence claim, App. 261a-266a, but sustained Joseph's constitutional challenges to the indictment and instructions, App. 181a-182a, and his claim of ineffective trial counsel, 224a-228a.

The district court held specifically that the Supreme Court of Ohio, in rejecting Joseph's insufficiency of the evidence claim, did not contravene or unreasonably apply the constitutional standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). App. 262a-266a. The district court granted the writ on Joseph's erroneous specification and instruction, and ineffective assistance of counsel claims. Rejecting the Warden's procedural default defense, the district court found that Ohio did not consistently enforce its waiver rules with respect to defective indictments, and that the ineffective assistance of trial counsel excused Joseph's

failure to object to the instructions. In the latter regard, the district court essentially held that the instructions were so erroneous that counsel must have been constitutionally ineffective in failing to object at trial. App. 227a.

Joseph appealed the district court's order insofar as it denied relief. The Sixth Circuit sustained the appeal in part, holding that Joseph's challenge to the sufficiency of the evidence on the capital specification also warranted habeas corpus relief. The Sixth Circuit did not dispute the evidence upon which the Supreme Court of Ohio held that a reasonable jury could have found that Joseph fatally stabbed Ryan Young, e.g., the evidence that more than one fatal wound was administered and that Joseph had a motive to kill Ryan. Rather, the Sixth Circuit held that the Supreme Court of Ohio unreasonably applied the *Jackson* standard in light of "clear" Ohio precedent "requir[ing] proof that the defendant personally inflicted the death blows in a situation where (as here) the defendant and a coconspirator are both present at the scene." App. 24a.

The Sixth Circuit next concluded that Joseph's conviction based on the capital specification as stated in the indictment violated Joseph's rights under the Eighth Amendment. The Sixth Circuit reasoned that Joseph's Eighth Amendment claim "is materially indistinguishable" from the prisoner's Eighth Amendment claim in *Esparza v. Mitchell*, 310 F.3d 414 (6th Cir. 2002), reversed and remanded, *Mitchell v. Esparza*, 540 U.S. 12 (2003). Accordingly, the Sixth Circuit granted relief based on its Eighth Amendment analysis in *Esparza*. The Sixth Circuit acknowledged the Court's reversal of its grant of relief in *Esparza*. However, the Sixth Circuit described the Court's reversal as a "response to our holding that the Eighth Amendment violation was not subject to harmless error analysis," and concluded that the Court "did *not* disturb our conclusion that a constitutional violation occurred." App. 27a.

The Warden cross-appealed the grant of the writ, arguing that the district court erred in rejecting the Warden's procedural default defenses and in holding that trial counsel was constitutionally ineffective. The Sixth Circuit denied the Warden's appeal. Based on its prior precedents, the Sixth Circuit agreed with the Warden that Joseph's "indictment and jury instruction claims" were procedurally defaulted, and that federal habeas review of the claims is barred unless Joseph can show cause and prejudice to excuse his defaults. However, the Sixth Circuit held that Joseph's trial counsel were constitutionally ineffective in failing to object to the specification and instructions, and that the ineffectiveness established both cause and prejudice. In the latter regard, the Sixth Circuit found it reasonably probable that, had counsel performed effectively, the prosecutor would have declined to charge Joseph with a capital defense, the jury would have found Joseph not guilty, or the trial court would have set aside or declined to approve the jury's verdict of death. App. 28a-35a.

REASONS FOR GRANTING THE WRIT

A federal court's power in habeas corpus extends solely to questions of federal law. "We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court." *Bradshaw v. Richey*, 546 U.S. 74, 126 S. Ct. 602, 604 (2005), citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). Under the standard of review set forth by 28 U.S.C. 2254(d)(1), a federal court in habeas corpus may overrule a state court only if the state court's determination on a federal question "applies a rule that contradicts the governing law set forth in *our* cases," or "confronts a set of facts that are materially indistinguishable from a decision of *this Court* and nevertheless arrives at a result different from *our* precedent." *Mitchell v. Esparza*, 540 U.S. at 15-16, quoting *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000) (emphasis added).

The question whether a state court errs in determining the facts is a different question from whether it errs in applying the law. *Rice v. Collins*, 126 S. Ct. at 976. Where the state court's conclusion is fact-based, to overturn it the federal court must find the state court's conclusion "an unreasonable determination ~~of the~~ facts in light of the evidence presented in the State court proceeding." 126 S. Ct. at 974, quoting 28 U.S.C. 2254(d)(2). "State-court fact findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.'" *Id.*, quoting 28 U.S.C. 2254(e)(1). While a federal court in habeas corpus may be obligated to exercise its independent judgment on a constitutional question presented by the facts of the case, it is not free to disregard other relevant factual findings by the state court. *Cady v. Dombrowski*, 413 U.S. 433, 443 (1973).

In granting habeas corpus relief, the Sixth Circuit misapplied these settled rules that limit its authority and role in habeas corpus, and erroneously disregarded relevant reasonable state-court determinations of fact. First, the Sixth Circuit, in overturning the Supreme Court of Ohio's decision on Joseph's insufficiency of the evidence claim, exceeded its role in habeas corpus by concluding that Ohio law required evidence that Joseph "personally" killed Ryan because a codefendant also took part in the murder. Second, the Sixth Circuit patently exceeded its authority in finding a violation of the Eighth Amendment based one of its own prior decisions that was subsequently reversed by this Court. Third and finally, in rejecting the Warden's procedural default defenses and granting relief based on the claimed ineffectiveness of trial counsel, the Sixth Circuit simply ignored the pivotal, relevant factual findings of the state court, to wit, that Joseph could not have been prejudiced by the mistaken language in the specification and instructions, in view of the facts that the jury form correctly stated the capital

specification, the trial court read the correct language to the jury, and all twelve jurors signed the verdict form.

A. The Sixth Circuit, in overturning the Supreme Court of Ohio's decision on Joseph's insufficiency of the evidence claim, exceeded its role in habeas corpus by substituting its judgment on a question of state law for the judgment of the state court.

The Sixth Circuit improperly overturned the Ohio court's determination that the prosecution presented sufficient evidence to convict Joseph on the death specification. The Sixth Circuit based its conclusion on its improper independent judgment that Ohio state law requires a prosecutor to prove that Joseph, and not his coconspirator, inflicted the fatal wounds.

On direct appeal, the Supreme Court of Ohio rejected Joseph's insufficiency of the evidence arguments, finding sufficient evidence in the record to convince the trier of fact that Joseph was guilty beyond a reasonable doubt of the kidnapping and murder of Ryan Young, and that Joseph was the principal offender in the commission of the aggravated murder. In finding legally sufficient evidence that Joseph actually killed Ryan Young, the Supreme Court of Ohio relied on evidence that Joseph had a motive to kill, based on evidence that he was jealous of Ryan's relationship with Cara Wireman, Joseph's former girlfriend; that just prior to Ryan's abduction, the white Cutlass often driven by Joseph was seen near Cara's home on Thayer Road as Ryan was about to leave; that Ryan's body was wrapped in Visqueen which matched Visqueen recovered from the job site at where Joseph had been working; that Joseph had a black ninja mask, and a black ninja mask was found under the body of the victim; and that Ryan suffered two stab wounds, either of which could have been fatal. Viewing this evidence in a light most favorable to the prosecution, the Supreme Court of Ohio held that it was as sufficient for a rational trier of fact to

find that appellant was the principal offender, i.e., an actual killer of Ryan Young. *State v. Joseph*, 73 Ohio St. 3d at 459.

The Supreme Court of Ohio applied the correct standard of constitutional sufficiency prescribed by this Court and as adapted by controlling state precedent. *See State v. Jenks*, 61 Ohio St. 3d 259, 273 (1991), following *Jackson v. Virginia*, 443 U.S. 307 (1979). It then determined that a rational factfinder could have found guilt beyond a reasonable doubt, based upon the circumstantial evidence linking Joseph to the kidnapping and murder, coupled with the evidence of a motive to commit the crimes. There is no indication that the Supreme Court of Ohio erroneously recounted the evidence of record upon which it relied. Nor is it unreasonable to conclude, based on the evidence cited, that a reasonable jury could have concluded that both Joseph and Bulerin inflicted the fatal knife wounds. Thus, as recognized by the district court, the Supreme Court of Ohio's decision is neither contrary to nor an unreasonable application of federal law as clearly established by this Court's decisions.

In habeas review, the district court properly affirmed Supreme Court of Ohio's conclusion on Joseph's insufficiency of evidence claim. In his habeas petition, Joseph relied primarily on the prosecutor's apparent concession at trial that the state could not prove whether Joseph or Bulerin inflicted the fatal wounds. Noting that its review of the Supreme Court of Ohio's decision was "limited to a determination of whether its conclusion was objectively unreasonable," the district court denied relief. The district court reasoned that the prosecutor's arguments did not necessarily establish that the evidence was not sufficient to sustain Joseph's conviction. App. 262a-266a.

The Sixth Circuit, however, improperly concluded that the Supreme Court of Ohio unreasonably applied *Jackson v. Virginia*. The Sixth Circuit found that Ohio law required that "when the defendant and a coconspirator are present at the

time and place of the murder, there must be evidence showing that the defendant struck the fatal blow(s)." App. 22a. The Sixth Circuit noted that none of the evidence cited by the state court "shows that Joseph personally inflicted either stab wound," App. 22a, and concluded that a reasonable juror could have inferred based on the evidence that either Joseph or Bulerin, or both, stabbed Ryan. Thus, the Sixth Circuit construed Ohio law to require, in such circumstances, that the prosecution present additional evidence that showed Joseph stabbed Ryan but excluded or did not implicate Bulerin, evidence that did *not* necessarily show that Bulerin inflicted one of the fatal wounds. According to the Sixth Circuit, the Supreme Court of Ohio unreasonably denied Joseph relief in light of this "clear" state law precedent. App. 24a.

The Sixth Circuit's conclusions regarding Ohio law improperly ignored Ohio's own interpretation of its law. The Supreme Court of Ohio has held definitively that "there can be more than one actual killer—and thus more than one principal offender—in an aggravated murder." *State v. Keene*, 81 Ohio St. 3d 646, 655 (1998), citing *State v. Joseph*, 73 Ohio St 3d at 469 (Moyer, C.J., dissenting in part and concurring in part). Notably, in dissent, Chief Justice Moyer did not find that the evidence was legally insufficient under the constitutional standard set forth in *Jackson v. Virginia*, nor did he suggest the rule derived by the Sixth Circuit. Rather, Chief Justice Moyer would have reversed the death sentence, based on the requirement of Ohio Rev. Code 2929.05 that the court independently review and determine whether the death penalty specification is supported by the evidence. Such a review is *not* the equivalent of a test for legal sufficiency. *See State v. Johnson*, 88 Ohio St. 3d 95, 112 (2000) (Ohio Rev. Code 2929.05 requires the court to determine whether the weight of the evidence supports a sentence of death, and "[a] verdict can be against the

manifest weight of the evidence even though legally sufficient evidence supports it.").

The Sixth Circuit exceeded its authority in habeas corpus by overturning the decision of the Supreme Court of Ohio. While the *Jackson* standard must be applied with reference to the elements of an offense as provided by state law, a federal court in habeas corpus is not free to substitute its judgment for the judgment of the state court on the elements of a criminal offense, which remain a question of state law. *Bradshaw v. Richey*, 126 S. Ct. at 603-604.

Moreover, the decisions of the Supreme Court of Ohio cited by the Sixth Circuit do not support its holding that under Ohio law "when the defendant and a coconspirator are present at the time and place of the murder, there must be evidence that the defendant struck the fatal blow(s)." App. 22a, citing *State v. Cunningham,* 105 Ohio St. 3d 197 (2004), and *State v. Taylor*, 66 Ohio St. 3d 295 (1993). No such rule can be found in these decisions. In *Cunningham*, the death penalty specifications did not allege that the defendant was a principal offender and hence no issue was even raised as to evidentiary sufficiency. 105 Ohio St. 3d at 200. Similarly, in *Taylor,* the death sentence was based on the jury's finding that the defendant was an accessory to the murder but acted with the prior calculation and design to kill. On appeal, the court held that there was insufficient evidence of prior calculation and design, and that, absent proof of prior calculation and design, conviction as an accomplice did not *as a matter of law* render the defendant a "principal" for the purposes of Ohio Rev. Code 2929.04(A)(7). The court's brief discussion of the evidence indicated simply that the co-defendant admitted to striking the fatal blows and that "there [was] no evidence to the contrary." 66 Ohio St. 3d at 307.

Nor is the Sixth Circuit's decision supported by its citation to the prosecutor's argument at trial that he "[did not] know who struck the death blow." App. 24a. The Sixth

Circuit cited no Supreme Court decision holding that prosecution's arguments at trial may be considered in determining whether the *evidence* presented by the state meets the constitutional standard of sufficiency. In any event, the prosecutor's argument, in context, is simply an obvious admission that because there were no witnesses to the murder other than the perpetrators, it could not possibly prove that Joseph and not Bulerin stabbed Ryan. The prosecutor did not suggest that it was required to prove this in order for the jury to conclude that Joseph inflicted the fatal wounds. And, the prosecutor correctly argued that the state was not required to show that Joseph actually stabbed Ryan to secure a guilty verdict on the aggravated murder count itself. *See Bradshaw v. Stumpf*, 545 U.S. 175, 125 S. Ct. 2398, 2406 (2005).

In short, the Sixth Circuit unquestionably exceeded its authority in habeas corpus by granting relief on Joseph's insufficiency of the evidence claim.

B. The Sixth Circuit exceeded its authority in finding a violation of the Eighth Amendment based one of its own prior decisions that was subsequently reversed by the Court.

The Sixth Circuit found that Joseph's conviction based on the capital specification as stated in the indictment violated Joseph's rights under the Eighth Amendment. The Sixth Circuit relied solely on its prior decision in *Esparza v. Mitchell*, 310 F.3d 414 (6th Cir. 2002), reversed and remanded, *Mitchell v. Esparza*, 540 U.S. 12 (2003). Acknowledging the Court's reversal of its grant of relief in *Esparza*, the Sixth Circuit described the Court's reversal as a "response to our holding that the Eighth Amendment violation was not subject to harmless error analysis," and concluded that the Court "did not disturb our conclusion that a constitutional violation occurred." The Sixth Circuit found that "as in *Esparza I*, the jury never found the statutorily required [capital specification], so the imposition of the death

penalty in unquestionably a violation of the Eighth Amendment." App. 26a.

The Sixth Circuit fundamentally erred in granting relief based on its prior decision in *Esparza*. First, contrary to the Sixth Circuit's finding, the Court's reversal of the Sixth Circuit's grant of relief in *Esparza* was not limited to simply correcting the Sixth Circuit's failure to apply a harmless error analysis. The Court initially and fundamentally found that the Sixth Circuit "failed to cite, much less apply," 28 U.S.C. 2254(d)(1) in granting habeas corpus relief. *Mitchell v. Esparza*, 540 U.S. at 15. In other words, the Sixth Circuit failed to determine whether Esparza's Eighth Amendment claim satisfied the basic requirement for relief. Thus, the Sixth Circuit's "constitutional analysis" in *Esparza* can hardly be described as "undisturbed," to the extent that it is proposed as a basis of relief in federal habeas corpus.

Second, the Court has never found an Eight Amendment violation under the facts presented in *Esparza* or in any other comparable case. In *Apprendi v. New Jersey*, 530 U.S. 466, 482-483 (2000), the Court held that if a state makes an increase in the defendant's punishment contingent on the finding of a fact, then the Sixth Amendment requires that such fact be found by a jury beyond a reasonable doubt. However, until very recently, it was not clearly established whether the Court's ruling in *Apprendi* applied in capital cases. *See Ring v. Arizona*, 536 U.S. 584 (2002). Moreover, this Court has never held that the failure of a jury to find a statutorily required aggravating circumstance is "unquestionably" a violation of the Eighth Amendment. *Ring v. Arizona*, 533 U.S. at 612 (Scalia, J., concurring) (noting that Court has not held that jury sentencing in capital cases is mandated by the Eighth Amendment).

In sum, the Sixth Circuit exceeded its authority by granting relief based on its decision in *Esparza v. Mitchell.*

C. In rejecting the Warden's procedural default defenses and granting relief based on the claimed ineffectiveness of trial counsel, the Sixth Circuit erred in ignoring relevant factual findings of the state court.

Even where a state prisoner exhausts available state court remedies, if the prisoner has failed to raise or preserve his constitutional claim in accordance with state procedural rules and the state courts have not addressed the merits of the claim due to the procedural default, habeas corpus review is barred unless the petitioner shows cause for the default and actual prejudice resulting from the constitutional violation. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Engle v. Isaac*, 456 U.S. 107 (1982); *Murray v. Carrier*, 477 U.S. 478 (1986). "[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." 477 U.S. at 486, quoting *Engle v. Isaac*, *supra*, 456 U.S. at 133-134. "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, [466 U.S. 668 (1984)], we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." *Murray v. Carrier*, 477 U.S. at 488.

In *Strickland*, the Court recognized that a criminal attorney's failure to act according to applicable professional standards does not necessarily result in the deprivation of the right to assistance of counsel guaranteed by the Sixth Amendment. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691, citing *United States v. Morrison*, 449 U.S. 361, 364-365 (1981). Thus, "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The Court has recognized explicitly the defendant's higher burden to show a reasonable probability of a different result where an objection has not been lodged at trial, as opposed to the government's burden to show that a constitutional error properly preserved for review had no effect on the outcome of the trial. *United States v. Benitez*, 542 U.S. 74, 83 (2004) (applying higher *Strickland* standard to a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11). It is beyond dispute that under *Strickland* the petitioner has the burden to establish a reasonable probability that but for counsel's error the result of the proceedings would have been different. *Strickland*, 466 U.S. at 649. Conversely, where a constitutional error has been properly preserved for review, the federal court must grant relief if it has grave doubt as to the possible effect of the error on the proceedings. *O'Neal v. McAninch*, 513 U.S. 432 (1995).

Based on its prior precedents, the Sixth Circuit agreed with the Warden that Joseph's "indictment and jury-instruction claims" were procedurally defaulted, and that federal habeas review of the claims is barred unless Joseph can show cause and prejudice to excuse his defaults. App. 28a. The Sixth Circuit held that Joseph's trial counsel were constitutionally ineffective in failing to object to the specification and instructions, and that the ineffectiveness established both cause and prejudice. App. 28a-35a. In the latter regard, the Sixth Circuit found it reasonably probable that had counsel performed effectively the prosecutor would have declined to charge Joseph with a capital defense, the jury would have found Joseph not guilty, or the trial court would have set aside or declined to approve the jury's verdict of death. App. 34a.

In reaching the above conclusion, the Sixth Circuit ignored the pivotal, factual findings of the Supreme Court of Ohio, relevant to the possible effect of the defective specification and the corresponding jury instructions. In the course of its review for plain error, the Supreme Court of Ohio held that Joseph had not been prejudiced by the defective specification and instructions, given the facts that the jury form correctly stated the capital specification, the trial court read the correct language to the jury, and all twelve jurors signed the verdict form. *State v. Joseph*, 73 Ohio St. 3d at 457. These factual findings obviously are relevant to whether there is a reasonable probability that the jury would *not* have found that Joseph was the principal offender in the aggravated murder, had trial counsel objected to the specification and the instructions.

As recognized by the district court, the Supreme Court of Ohio's assessment and factual findings were objectively reasonable. In fact, the district court found specifically that it was just as likely that the jury actually found that Joseph was a principal in the aggravated murder. In the words of the district court, "[T]he jury may have convicted Mr. Joseph based on the proper specification—as being the principal offender in the commission of the aggravated murder . . . ." App. 175a. As found by the Ohio courts, and recognized by the district court, while the trial court read the flawed specification to the jury as part of the instructions, the court also read to the jury the verdict form which contained the properly worded specification, and the jury signed the form in rendering its verdict. App. 180; *Joseph*, 73 Ohio St. 3d at 461.

In comparison, the factual findings of the Sixth Circuit are highly unreasonable. Had counsel objected to the indictment, it is highly unlikely that the prosecutor would have declined to charge Joseph with a capital defense. As found by the Supreme Court of Ohio, the prosecutor simply could have cured the defect by moving to amend the

indictment. *Joseph*, 73 Ohio St. 3d at 457. It is possible that the jury might have found that Joseph was not a principal offender in the aggravated murder, had the instructions on this point been clearer. But this is not a situation where the jury has issued a general verdict, the import of which is dependent on the jurors' interpretation of ambiguous instructions. Here all twelve jurors signed a verdict form signifying that Joseph was a principal offender in the aggravated murder. Thus, it would seem reasonably *unlikely* that there verdict would have been different, had the instruction been clearer. Finally, it is pure speculation that the trial court would have set aside or declined to approve the jury's verdict of death, had counsel lodged belated objections.

In sum, the Sixth Circuit erred in ignoring relevant factual findings by the Supreme Court of Ohio.

CONCLUSION

For the above reasons, the Court should grant the State's petition and reverse the Sixth Circuit's decision.

JIM PETRO
Attorney General of Ohio

STEPHEN P. CARNEY
State Solicitor
**Counsel of Record*
ELIZABETH T. SCAVO
Assistant Solicitor
CHARLES L. WILLE
Assistant Attorney General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
Counsel for Petitioner

Supreme Court, U.S.
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OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

MARC HOUK, Warden,

Petitioner,

v.

RICHARD JOSEPH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

JIM PETRO
Attorney General of Ohio

STEPHEN P. CARNEY*
Senior Solicitor
**Counsel of Record*
ELIZABETH T. SCAVO
Assistant Solicitor
CHARLES L. WILLE
Assistant Attorney General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Petitioner

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206
File Name: 06a0418p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD JOSEPH,
Petitioner-Appellant/
Cross-Appellee,

v.

RALPH COYLE, Warden,
Respondent-Appellee/
Cross-Appellant.

Nos. 05-3111/3113

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 98-00527—Lesley Wells, District Judge.

Argued: June 8, 2006

Decided and Filed: November 9, 2006

Before: MOORE, COLE, and CLAY, Circuit Judges.

COUNSEL

ARGUED: Edmund W. Searby, SCOTT & SCOTT, Chagrin Falls, Ohio, for Appellant. Charles L. Wille, ATTORNEY

GENERAL'S OFFICE OF OHIO, Columbus, Ohio, for Appellee.
ON BRIEF: Edmund W. Searby, Jennifer I. Cupar, SCOTT & SCOTT, Chagrin Falls, Ohio, for Appellant. Charles L. Wille, ATTORNEY GENERAL'S OFFICE OF OHIO, Columbus, Ohio, for Appellee.

OPINION

KAREN NELSON MOORE, Circuit Judge. An Ohio jury convicted Richard Joseph of aggravated murder. The jury also convicted Joseph of a single capital specification, which made him eligible for the death penalty, and, after a mitigation hearing, recommended a sentence of death. The trial court accepted this recommendation and imposed the death penalty, which was upheld on direct and state post-conviction review. Asserting twenty grounds for relief, Joseph petitioned the district court for a writ of habeas corpus. The district court granted the writ on four grounds relating to a fundamental error in the capital specification: although the specification required Joseph to be the principal offender in the commission of the *aggravated murder*, everyone at trial proceeded under the mistaken view that the specification required Joseph to be the principal offender in the commission of the *kidnapping*. The district court denied Joseph's remaining claims. Joseph appeals the denial of six of his sixteen unsuccessful claims, while the state cross-appeals the grant of the writ.

For the reasons discussed below, we **AFFIRM** the grant of a writ of habeas corpus.

I. BACKGROUND

A. Factual Background

Because this case turns not on factual disputes but on issues of law, we present the following account of the facts from the Ohio Supreme Court's decision:

> During the fall of 1989, . . . Joseph, began dating Cara M. Wireman. They began to date steadily until sometime in February 1990. Cara decided to end the relationship because she did not like the way [Joseph] treated her and she attended her senior prom with someone else. In April, Cara started dating the victim, Ryan Young, a student at the same high school. Ryan and [Joseph] knew each other from playing together on the school football team.
>
> Cara testified that [Joseph] was jealous of Ryan's relationship with her. [Joseph] wanted her to stop seeing Ryan so they could renew their relationship. This was evidenced by several letters [Joseph] wrote to Cara indicating his jealousy and desire to continue dating Cara. In one letter, he indicated he had been secretly watching Cara and Ryan together for three hours. Cara knew that martial arts played a big part in [Joseph's] life and she had previously seen him with guns and knives.
>
> On Monday, June 25, 1990, the day prior to the kidnapping, Cara and Ryan observed [Joseph] driving around in the area where Cara and Ryan both lived. Cara indicated she did not normally see [Joseph] driving in this area.
>
> On Tuesday, June 26, 1990, Ryan asked his mother if he could go to Cara's house, and he left

around seven o'clock that evening driving his father's 1981 Oldsmobile. Ryan's mother received a telephone call from Ryan about 10:30 p.m. that evening and, during that conversation, she told him he could stay and finish watching the movie and then come straight home.

Cara's next-door neighbor, Rose Fetter, was outside walking her dog at about 11:15 p.m. that night, when she observed a clean white car driving slowly down Thayer Road. There were two occupants in the car. Fetter indicated she first saw the car being driven north up Thayer Road. About ten minutes later she observed the car heading south on Thayer Road. The car pulled into a dirt driveway leading to property owned by a local kennel club and parked for a few minutes. Just prior to Fetter's going into her home she observed the car back out of the driveway and head north for a second time. Fetter testified she and her husband took care of the property for the kennel club and that she mowed around the driveway earlier in the day and did not observe any tire tracks at that time. However, the next morning she noticed there were tire tracks in the driveway.

Ryan, Cara, and Cara's friend, Michelle Rumer, were at the same time watching the movie at Cara's house. The movie ended at approximately 11:30 p.m., at which time Michelle left to go home. Ryan stayed about fifteen or twenty minutes after Michelle left. Ryan and Cara walked out of Cara's house and into the driveway. As Ryan got into the car, Cara heard Ryan remark, "That looks like the White Cutlass that [Joseph] drives." Cara responded, "I doubt that. He wouldn't be out here." Ryan said, "I'm pretty sure that was him."

Ryan was wearing a baseball hat turned backwards on his head that night. Cara saw Ryan back out onto Thayer Road into a position that would permit him to drive north on Thayer. Just as Ryan backed onto the roadway, she saw the dome light in his car illuminate and heard a voice when the dome light came on. Cara also saw Ryan's head turn toward the passenger side door.

Cara went back into the house and watched television for about fifteen minutes. She decided to go to bed, so she went to shut the front door and saw the tail end of a white car drive by slowly heading south on Thayer Road. She saw the tail lights on the car and heard the brakes squeak. The subject car repeatedly turned around after passing Cara's residence and passed in front of her house approximately ten to twelve times. Cara testified the car matched the description of the car belonging to Bill Forest, a friend of [Joseph]. Cara testified [Joseph] and Jose Bulerin, [Joseph's] friend and roommate, often borrowed Forest's car. Cara became upset and called Michelle concerning the car that had passed in front of her house. At about 12:35 a.m., Cara called the residence shared by [Joseph] and Bulerin. She spoke with [Joseph's] cousin, April Joseph, who testified neither [Joseph] nor Bulerin was home to answer the call. Cara again called Michelle and talked for a while before calling [Joseph's] residence a second time at 1:00 a.m. [Joseph] and Bulerin still had not returned home.

Cara went to sleep and was awakened by a phone call from Ryan's mother, Sharon Young, at approximately 4:00 a.m. that morning. At about that time, Ryan's father, Rick Young, awoke and discovered that neither his son nor the car Ryan had been driving was home. The Youngs drove down

Thayer Road toward Cara's house in search of their son. They found the 1981 Oldsmobile Cutlass Ryan had been driving abandoned just north of the bridge on Thayer Road. Rick entered the car and nothing apparently was out of place. The keys were still in the ignition and the car was still in gear. There were no indications of a robbery, as Ryan's wallet and money were, respectively, left on the seat and console tray of the car. A wet spot and char marks were found on the passenger seat of the car. The seat had not been wet or dirty the day before.

Inspector William Dailey took a material sample of a burnt log located across the road opposite from Cara's house on the morning of June 27, 1990. The inspector observed that the vegetation there was trampled down so that it led him to believe that someone may have been sitting in that area. The vegetation still had its color and the breaks in the leaves appeared to be fresh. He also took a sample of the blackened stain area on the front seat of Ryan's car for purposes of comparison with the burned log. Chemical analysis performed later revealed that the samples were consistent with one another.

The sheriff's department was notified and a search began. After talking with Cara, Deputy Gene King of the Allen County Sheriff's Office proceeded to [Joseph's] residence to question him concerning Ryan's disappearance. King arrived at [Joseph's] residence at approximately 5:10 a.m. on the morning Ryan was discovered missing and observed a white Cutlass in the driveway. King testified that the hood and radiator of the car were warm to the touch. There was also a dirty hand print on the trunk lid of the vehicle.

King spoke with [Joseph] and Bulerin. [Joseph] was hesitant to respond to questioning, as he persistently stared at the ground and his answers were invariably inaudible. The deputy testified that in spite of the early morning hour, [Joseph] did not appear to have been asleep. The deputy also noticed fresh blisters on [Joseph's] right hand.

[Joseph] was questioned both later that morning and about a week afterwards by law enforcement officers. [Joseph] disclaimed any knowledge of Ryan's disappearance. [Joseph] told the sheriff's detectives that on the day of the disappearance he reported to work at Frank's Car Wash. He then left with Forest to go to work at Indian Lake in Logan County. Forest testified that they had been building a deck in order to install a hot tub adjacent to a house. [Joseph], Bulerin, and Forest were using Visqueen to cover up the deck to protect against the rain.

[Joseph] told detectives that the trio worked until about 6:30 p.m. before starting back to Lima to attend karate class. According to Forest, the karate class was taught by Bulerin with [Joseph] helping out as a co-instructor. [Joseph] and Bulerin then left karate class in Forest's car, the white Cutlass. Forest testified he left class with his girlfriend and did not see either [Joseph] or Bulerin again that night. [Joseph] and Bulerin went home, got cleaned up, and then left to get something to eat. [Joseph] stated that, afterwards, the pair drove around in Forest's car for several hours before returning home and going to bed at approximately 2:30 a.m. [Joseph] also stated that the brakes on Forest's car did squeak on that night.

Although Forest's car had new tires on it, Bulerin took Forest's car and changed the tires the day following Ryan's disappearance. Three of the tires

that had been on Forest's car the night of Ryan's abduction were recovered by Detective Sergeant James Ketchum, who testified the tread pattern on one of the tires was similar to the tire prints found in the driveway to the kennel club located on Thayer Road.

Forest had kept a knife clipped to the sun visor in his car that was identical to another knife owned by a friend of his. The knife of Forest's friend was subsequently turned over to Lieutenant Van Horn by Forest for the investigation. Forest's knife had been in Forest's automobile on June 26, 1990; however, it had not been seen since. Forest testified that [Joseph] and Bulerin had used his car, had access to it, and traveled in it together frequently. [Joseph] and Bulerin also kept articles in his car, and he had observed a piece of material described as plastic, vinyl, or Visqueen and a shovel in his trunk. Forest had observed the same shovel before at [Joseph's] house. Forest also testified that he had watched a lot of movies with [Joseph] and Bulerin, many of which dealt with the martial arts. He also knew that [Joseph] had a black mask.

Monte Stinebuck worked at Frank's Auto Wash with [Joseph], Forest, and Bulerin. He testified that he saw [Joseph] and Bulerin on Thursday, June 28, 1990, and it was rainy that day. A discussion ensued regarding hauling some trash from the car wash and taking it to Joseph's Sand and Gravel Pit. They had never taken trash there before and the truck was loaded a quarter full.

Throughout the week following Ryan's disappearance, an extensive search was conducted. On July 4, 1990, the Allen County Sheriff's Department acted upon the information provided by Stinebuck and instituted a search at Joseph's Sand

> and Gravel Pit located in Auglaize County and owned by Joseph's grandparents. Mary Joseph, [Joseph's] grandmother, testified that she owned the sand and gravel pit and that [Joseph] was familiar with it, as he had spent a lot of time there growing up.
>
> Ryan's body was discovered in a shallow grave. The body was wrapped in Visqueen, the jagged edge of which was matched positively with Visqueen recovered from the job site at Indian Lake where [Joseph] had been working. Under the body, a black ninja mask was recovered. An autopsy revealed that Ryan had superficial lacerations in the area of the throat. Further, Ryan had been stabbed two times in the back — one to the right flank and one at the base of the skull.

State v. Joseph, 653 N.E.2d 285, 287-90 (Ohio 1995), *cert. denied*, 516 U.S. 1178 (1996).

B. Procedural Background

Joseph and Bulerin were jointly indicted for "purposely caus[ing] the death of another, to wit: Ryan R. Young, while committing or while fleeing immediately after committing kidnapping," 3 Joint Appendix ("J.A.") at 962 (Indictment), which is a type of aggravated murder. *See* OHIO REV. CODE § 2903.01(B) (1987). The indictment contained an incorrect version of the capital specification of being the principal offender in the commission of the aggravated murder. *See id.* § 2929.04(A)(7). (Much more on this error below.) Joseph was tried alone before a jury,[1] which found him guilty of

[1] Bulerin was tried separately before a three-judge panel, which convicted him of both the aggravated murder and the capital specification. The panel found that the aggravating circumstances did not outweigh the mitigating factors, so Bulerin was sentenced to life imprisonment. *State v. Bulerin*, No. 1-91-24, 1992 WL 136182, at *1 (Ohio Ct. App. June 11, 1992) (unpublished opinion).

both the aggravated murder and the specification. In the penalty phase, the jury found that the aggravating circumstances outweighed the mitigating factors and recommended a sentence of death. After conducting an independent review, *see id.* § 2929.03(D)(3), the trial court accepted this recommendation and imposed a death sentence. Joseph's conviction and sentence were affirmed by both the Ohio Court of Appeals, *State v. Joseph* (*Joseph I*), No. 1-91-11, 1993 WL 531858 (Ohio Ct. App. Dec. 23, 1993) (unpublished opinion), and the Ohio Supreme Court, *State v. Joseph* (*Joseph II*), 653 N.E.2d 285 (Ohio 1995), and the United States Supreme Court denied certiorari, *Joseph v. Ohio*, 516 U.S. 1178 (1996). The Ohio courts denied postconviction relief. *State v. Joseph*, No. 1-96-90, 1997 WL 404252 (Ohio Ct. App. July 17, 1997) (unpublished opinion) (affirming denial of relief), *appeal denied*, 686 N.E.2d 276 (Ohio 1997) (table decision).

Asserting twenty grounds for relief, Joseph petitioned the district court for a writ of habeas corpus. In a thorough 218-page opinion and order, the district court determined four claims to be meritorious: (1) Joseph was denied due process because the capital specification included in the indictment was incorrect; (2) Joseph was denied due process because the jury instructions regarding the capital specification were incorrect; (3) Joseph was denied the effective assistance of counsel because his trial attorney failed to object to the flawed indictment and jury instructions and otherwise misunderstood the capital specification; and (4) Joseph's death sentence was imposed in the absence of a valid capital specification, in violation of the Eighth Amendment's narrowing requirement. Based on these claims, the district court issued the following order:

> [T]his Court issues a writ of habeas corpus ordering that Mr. Joseph's death sentence be set aside and that he be re-sentenced according to the statutory guidelines for aggravated murder in the absence of a

> capital specification, as set forth in O.R.C. § 2929.03(A), which mandates a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment. Unless Mr. Joseph is resentenced within 180 days from the effective date of this Order, the respondent shall release him from custody. On this Court's own motion, execution of this Order and hence, its effective date, is stayed pending appeal by the parties.

2 J.A. at 831 (Dist. Ct. Memo. of Op. & Order at 218). The district court rejected the remaining sixteen grounds for relief, but it issued a certificate of appealability as to all issues. Joseph now appeals the denial of six of the sixteen claims rejected by the district court: two of these attack the sufficiency of the evidence of the capital specification, while the remaining four challenge the aggravated murder conviction. The state cross-appeals the issuance of the writ.

II. STANDARD OF REVIEW

We review de novo a district court's decision to grant or deny a petition for a writ of habeas corpus. *Burton v. Renico*, 391 F.3d 764, 770 (6th Cir. 2004), *cert. denied*, — U.S. —, 126 S. Ct. 353 (2005). Because Joseph filed his habeas petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), its rovisions apply to his case. *Woodford v. Garceau*, 538 U.S. 202, 210 (2003); *Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

Under AEDPA, a federal court may grant a writ of habeas corpus with respect to a "claim that was adjudicated on the merits in State court proceedings" if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §

2254(d)(1).[2] A state-court decision is contrary to clearly established federal law "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A state-court decision is an unreasonable application of clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case," *id.* at 407-08, or if it "either unreasonably extends or unreasonably refuses to extend a legal principle from Supreme Court precedent to a new context," *Seymour v. Walker*, 224 F.3d 542, 549 (6th Cir. 2000), *cert. denied*, 532 U.S. 989 (2001); *see also Ramdass v. Angelone*, 530 U.S. 156, 166 (2000) (plurality opinion).

As the text of the statute makes clear, however, § 2254(d)(1)'s limits on habeas relief apply only if there is a state-court "adjudicat[ion] on the merits" of a given claim. For reasons we discuss at greater length in Part IV.C, Joseph's *Brady* claim was not "adjudicated on the merits in State court proceedings" and therefore is not governed by the strictures of § 2254(d)(1). Joseph's remaining claims were, however, "adjudicated on the merits" by the state courts, so § 2254(d)(1)'s limits apply. For each of these claims, the decision we review is that of "the last state court to issue a reasoned opinion on the issue." *Payne v. Bell*, 418 F.3d 644, 660 (6th Cir. 2005), *cert. denied*, — U.S. —, 2006 WL 732193 (U.S. June 26, 2006) (No. 05-9829); *see also, e.g.*, *Schultz v. Page*, 313 F.3d 1010, 1015 (7th Cir. 2002) ("[A] federal court reviewing a habeas petition should examine the

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[2] A habeas petition may also be granted if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2), but this avenue of relief is not relevant to the instant case.

decision of the last state court to rule on the merits of the issue."), *cert. denied*, 538 U.S. 1057 (2003); *Franklin v. Johnson*, 290 F.3d 1223, 1233 n.3 (9th Cir. 2002) ("This court . . . must look to the last reasoned decision of the state court as the basis of the state court's judgment."); *Barrientes v. Johnson*, 221 F.3d 741, 779 (5th Cir. 2000) ("When the last state adjudication of the claim is silent or ambiguous, the federal court should look through to the last clear state decision on the matter." (internal quotation marks omitted)), *cert. dismissed*, 531 U.S. 1134 (2001). For Joseph's indictment, jury-instruction, and sufficiency-of-the-evidence claims, the last reasoned decision is that of the Ohio Supreme Court. With respect to the *Miranda*, pretrial-publicity, prosecutorial-misconduct, ineffective-assistance, and Eighth Amendment claims, which the Ohio Supreme Court declined to address, the last reasoned decision is that of the Ohio Court of Appeals.

III. CLAIMS RELATING TO THE CAPITAL SPECIFICATION

Joseph attacks his death sentence on several grounds, arguing that the state violated his constitutional rights under the Due Process Clause (in three different ways), the Sixth Amendment, and the Eighth Amendment. Yet the facts underlying these claims are really just variations on the same theme: every participant in the trial — the prosecution, Joseph's counsel, the trial judge, and the jurors — operated under a mistaken view of the single capital specification with which Joseph was charged. Thus, before addressing Joseph's individual claims, we present the following brief summary of the specification and how it was misconstrued during the state proceedings.

Ohio law makes a defendant convicted of aggravated murder eligible for the death penalty only if one or more specifications is included in the indictment and proved

beyond a reasonable doubt.[3] OHIO REV. CODE ANN. § 2929.04(A) (1987); *see also id.* § 2929.03(A). The statutory text of the capital specification at issue in this case provides in relevant part:

> The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit *kidnapping*, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the *principal offender in the commission of the aggravated murder* or, if not the principal offender, committed the aggravated murder with prior calculation and design.

Id. § 2929.04(A)(7) (italics and underline added). As will be discussed further below, the Ohio Supreme Court has interpreted the element of being "the principal offender in the commission of the aggravated murder" to mean that the defendant "actually killed" the victim.

> Joseph's indictment included the following specification:

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[3] The specification(s) must be made "pursuant to section 2941.14." OHIO REV. CODE ANN. § 2929.04(A) (1987). Section 2941.14 provides in relevant part:

> A specification to an indictment . . . charging aggravated murder shall be stated at the end of the body of the indictment . . . , and may be in substantially the following form:
>
> "*Specification* . . . . The Grand Jurors further find and specify that (set forth the applicable aggravating circumstance listed in divisions (A)(1) to (8) of section 2929.04 of the Revised Code. The aggravating circumstance may be stated in the words of the subdivision in which it appears, or in words sufficient to give the accused notice of the same)."

Id. § 2941.14(C).

> The Grand Jurors further find and specify that the offense was committed while the offenders were committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, and the offenders were the *principal offenders in the commission of the kidnapping* . . . .

3 J.A. at 962 (Indictment) (italics and underline added).[4] To be explicit, the indictment substituted the word "kidnapping" in place of the word "aggravated murder" in the "principal offender" phrase. Thus, although the statute requires that the defendant be the principal offender in the commission of the *aggravated murder*, Joseph's indictment alleged that Joseph was the principal offender in the commission of the *kidnapping*. In other words, the indictment's version of the capital specification did not include the critical requirement that Joseph "actually killed" the victim. Joseph's counsel did not object to the error in the indictment.

During the guilt-phase trial, counsel for both the state and Joseph adopted the indictment's mistaken formulation of the specification. In its opening statement, the state said the following:

> This case is an aggravated murder case with a specification of *kidnapping*. That makes it a capital case. The State of Ohio needs to prove to you folks that Jose Bulerin and Richard Joseph jointly purposely caused the death of another, to wit: Ryan R. Young, while committing or while fleeing immediately after committing *kidnapping*. The State of Ohio needs to prove these elements beyond a reasonable doubt.

---

[4] The indictment did not allege the "prior calculation and design" prong of the statutory specification.

8 J.A. at 3107-08 (Trial Tr. at 1201-02) (emphases added). Thus, in explaining the specification that it "need[ed] to prove" in order to "make[] it a capital case," the state mentioned the kidnapping element but omitted the requirement that Joseph be the principal offender in the commission of the aggravated murder. The state referred to "a specification of *kidnapping*" again in its rebuttal. 11 J.A. at 3980 (Trial Tr. at 2049) (emphasis added).

The state's failure to understand the specification was perhaps most evident in the following part of its closing argument:

> Another thing the State of Ohio doesn't know and can't tell you, and it doesn't make any difference as long as you find the two people, Jose Bulerin and Richard E. Joseph, jointly committed these crimes, or this crime, the law is very clear in Ohio that if one person is an aider and abetter, no matter what part he has in it, if he plays a part in the commission of that crime then he's as guilty as the other guy. The State of Ohio can't tell you. I wish I could. I wish I could tell you exactly what happened. I don't know who struck the death blow. But, I believe the evidence is very clear that it was one of the two that's charged here. If you find one of them did it, or the other one did it, they're both just as guilty as if each of them had their hands around the hilt of that knife when it was stuck in Ryan Young.

11 J.A. at 3907 (Trial Tr. at 1976). The state made the same point in its rebuttal: "We don't have to show that this defendant was the one who administered the fatal blows. He was with him. We don't know which one did it. We don't have to prove that." 11 J.A. at 3973 (Trial Tr. at 2042). In other words, the state conceded that it could not prove that Joseph actually killed Young, but it also erroneously told the jury that this shortcoming did not matter. Joseph's counsel

did not object to any of these statements by the state. In fact, Joseph's counsel made the same mistake in his own opening statement and closing argument, referring to the "specification of *kidnapping*" without mentioning the principal-offender-in-the-aggravated-murder (i.e., actual-killer) requirement. 9 J.A. at 3128, 3130, 3963 (Trial Tr. at 1222, 1224, 2032) (emphasis added).

The incorrect specification also found its way into the trial court's instructions to the jury at the close of the guilt phase. The court incorrectly described the specification as requiring that Joseph be "the principal offender[] in the commission of the *kidnapping*." 11 J.A. at 3998 (Trial Tr. at 2067) (emphasis added). On several other occasions, the court did not explicitly recite the incorrect specification, but it referred to the specification *in the indictment*, which was, of course, independently incorrect as discussed above. 11 J.A. at 3996-97, 4003, 4004 (Trial Tr. at 2065-66, 2072, 2073). The court also once read from the verdict form, which included a correct version of the specification. 11 J.A. at 4005-06 (Trial Tr. at 2074-75). At no point did the court instruct the jury that the principal-offender provision of the specification requires that the defendant "actually killed" the victim.[5] Joseph's counsel did not object to the incorrect aspects of the jury instructions.

The penalty phase also saw numerous instances of the erroneous capital specification. The trial court began the mitigation hearing by reminding the jury that it had found

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[5] Instead, the court simply said that "[a] principal offender or offenders is defined as that person or persons primarily responsible for the alleged illegal conduct involved." 11 J.A. at 3998 (Trial Tr. at 2067). This instruction obviously does not clarify that the relevant "illegal conduct" is the murder, not the kidnapping. Thus, the instruction is even vaguer than one that the Ohio Supreme Court has held to be insufficient. *See State v. Skatzes*, 819 N.E.2d 215, 240-41 (Ohio 2004) (deeming erroneous a principal-offender instruction that the defendant "ha[d] hands-on involvement *in a homicide*" (emphasis added)).

Joseph guilty of the specification and instructing them that this specification was the only aggravating circumstance. In doing so, the court read the incorrect version of the specification, using the phrase "principal offender[] in the commission of the *kidnapping*." 11 J.A. at 4069 (Mitigation Tr. at 26) (emphasis added). The state equated the aggravating circumstance with kidnapping in both its closing and rebuttal arguments.[6] 11 J.A. at 4333 (Mitigation Tr. at 282); 12 J.A. at 4366, 4371 (Mitigation Tr. at 315, 320). In its instructions to the jury at the close of the penalty phase, the court read the correct version of the specification. 12 J.A. at 4377 (Mitigation Tr. at 326). However, the court also referred to the specification *in the indictment*, which was, of course, incorrect. 12 J.A. at 4375 (Mitigation Tr. at 324). Moreover, throughout its instructions, the court consistently used some version of the phrase "the aggravating circumstance which the defendant was found guilty of committing" (during the guilt phase). 12 J.A. at 4371-72, 4373, 4374, 4377, 4380 (Mitigation Tr. at 320-21, 322, 323, 326, 329). This phrase was also used in the verdict forms, which the court read to the jury. 12 J.A. at 4381-82 (Mitigation Tr. at 330-31). Thus, the jury instructions and the verdict form implicitly incorporated the erroneous version of the specification that had been repeatedly invoked during the guilt phase. Joseph's counsel did not object to either the court's or the state's statements. Instead, Joseph's counsel himself referred to the aggravating circumstance as kidnapping — three times during his opening statement, 11

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[6] In its closing argument, the state used the correct phrase, "principal offender in the commission of the aggravated murder." 11 J.A. at 4333 (Mitigation Tr. at 282). However, immediately before using this language, the state referred to the "aggravating circumstance . . set out in the indictment," and immediately afterward it said, "[y]ou need in your deliberations to think about the evidence that you heard involving the kidnapping and weigh that with the mitigation evidence that you heard." *Id.* Thus, we count the overall statement as another erroneous recitation of the specification/aggravating circumstance.

J.A. at 4073-74 (Mitigation Tr. at 30-31), and twice during his closing argument, 12 J.A. at 4353-54 (Mitigation Tr. at 302-03).

Finally, during the trial court's independent review of the jury's death-penalty recommendation, *see* OHIO REV. CODE ANN. § 2929.03(D)(3) (1987), both Joseph's counsel and the court referred to the aggravating circumstance of kidnapping.[7] 12 J.A. at 4411, 4412, 4414, 4416 (Mitigation Tr. at 360, 361, 363, 365).

A. Sufficiency of the Evidence

We first address Joseph's sufficiency-of-the-evidence claim. *See, e.g.*, *United States v. Aarons*, 718 F.2d 188, 189 n.1 (6th Cir. 1983) ("Where the sufficiency of the evidence is properly before us, we consider that issue first because it is determinative of whether the appellant may be retried."). In a due-process challenge to the sufficiency of the evidence, clearly established Supreme Court precedent provides that "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Joseph argues that the state court unreasonably applied *Jackson* in that there was no evidence of the critical element of the capital specification: being the principal offender in the commission of the aggravated murder. In the habeas context, "[t]he *Jackson* standard must be applied 'with explicit reference to the substantive elements of the criminal offense as defined by state law.'" *Brown v. Palmer*, 441 F.3d

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[7] Without elaboration, the state simply asked the court to follow the jury's recommendation. 12 J.A. at 4411 (Mitigation Tr. at 360). Thus, it did not have the opportunity to repeat the erroneous version of the specification/aggravating circumstance.

347, 351 (6th Cir. 2006) (quoting *Jackson*, 443 U.S. at 324 n.16). Thus, we turn to the Ohio courts' definition of the capital specification at issue here.

As we have already noted, the correct version of the single capital specification with which Joseph was charged requires the defendant to be "the principal offender in the commission of the aggravated murder." OHIO REV. CODE ANN. § 2929.04(A)(7) (1987). The Ohio Supreme Court has consistently interpreted this element to require the defendant to be "the actual killer." *State v. Taylor*, 612 N.E.2d 316, 325 (Ohio 1993); *State v. Wiles*, 571 N.E.2d 97, 122 (Ohio 1991), *cert. denied*, 506 U.S. 832 (1992); *State v. Penix*, 513 N.E.2d 744, 746 (Ohio 1987); *see also Mitchell v.Esparza*, 540 U.S. 12, 18 (2003) (acknowledging this interpretation). Other formulations of "actual killer" are that the defendant "personally performed every act constituting the offense of aggravated murder," *State v. Sneed*, 584 N.E.2d 1160, 1168 (Ohio 1992), *cert. denied*, 507 U.S. 983 (1993); *see also State v. Goodwin*, 703 N.E.2d 1251, 1264-65 (Ohio) (approving a similar instruction), *cert. denied*, 528 U.S. 846 (1999); *State v. Getsy*, 702 N.E.2d 866, 884 (Ohio 1998) (same), *cert. denied*, 527 U.S. 1042 (1999), or "directly caused the death," *State v. Stallings*, 731 N.E.2d 159, 173 (Ohio 2000), *cert. denied*, 534 U.S. 836 (2001). However, it is not enough that the defendant simply "ha[d] hands-on involvement in a homicide." *State v. Skatzes*, 819 N.E.2d 215, 240-41 (Ohio 2004); *see also State v. Skatzes*, No. 15848, 2003 WL 24196406, at *40 (Ohio Ct. App. Jan. 31, 2003) (unpublished opinion) (explaining that it is not enough for the defendant to be "an escort or a mere provider of a weapon.").

There have been many cases where the evidence has been sufficient to show that the defendant was the actual killer. When the victim died of gunshot wounds, there was evidence that the defendant fired the shots. *See, e.g., State v. Jackson*, 839 N.E.2d 362, 370, 377 (Ohio 2006); *State v. Noling*, 781

N.E.2d 88, 96-97, 105 (Ohio 2002), *cert. denied*, 539 U.S. 907 (2003); *State v. Gross*, 776 N.E.2d 1061, 1073, 1093 (Ohio 2002), *cert. denied*, 538 U.S. 1037 (2003); *State v. Yarbrough*, 767 N.E.2d 216, 241 (Ohio), *cert. denied*, 537 U.S. 1023 (2002); *Stallings*, 731 N.E.2d at 173; *State v. Chinn*, 709 N.E.2d 1166, 1177 (Ohio 1999), *cert. denied*, 528 U.S. 1120 (2000). When the victim died of head trauma, there was evidence that the defendant struck the blows. *See Skatzes*, 819 N.E.2d at 231-32, 241. When the victim died of knife wounds, there was evidence that the defendant stabbed the victim. *See State v. Stojetz*, 705 N.E.2d 329, 337 (Ohio), *cert. denied*, 528 U.S. 999 (1999). Thus, the Ohio Supreme Court has consistently interpreted the principaloffender/ actual-killer element to mean that the defendant personally inflicted the death blow(s).[8]

In rejecting Joseph's *Jackson* claim, the Ohio Supreme Court cited the following evidence. *Joseph II*, 653 N.E.2d at 293. First, there was evidence of motive, as Joseph was jealous of the relationship between Wireman and Young. Second, Joseph admitted that he and Bulerin were out driving Forest's white Cutlass on the night of the murder, and a matching vehicle was seen near Wireman's house. Third, Young's body was found buried on Joseph's grandparents' property, wrapped in material (Visqueen) available to Joseph, near a mask like one owned by Joseph. Fourth, "[Young] suffered two stab wounds, either of which could have been fatal, and the knife always kept in the car was missing the morning of the disappearance." The state points to no additional evidence in its briefs before this court, and there is none apparent in the record.

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[8] This proposition is consistent with the fact that there may be multiple principal offenders corresponding to multiple fatal blows. *See Stojetz*, 705 N.E.2d at 337; *State v. Keene*, 693 N.E.2d 246, 256 (Ohio), *cert. denied*, 525 U.S. 936 (1998).

It is immediately apparent, however, that *none* of this evidence shows that Joseph personally inflicted either stab wound. This fact does not present an obstacle to conviction in a case where the defendant was the only person either present when the victim was murdered or otherwise involved in the crime, the logic being that he is the only person who could have actually committed the murder. But when the defendant and a coconspirator are present at the time and place of the murder, there must be evidence showing that the defendant struck the fatal blow(s). *See State v. Cunningham*, 824 N.E.2d 504, 512, 531 (Ohio 2004), *cert. denied*, — U.S. —, 126 S. Ct. 110 (2005); *Taylor*, 612 N.E.2d at 325.

All indications are that Joseph was neither alone with Young on the night of the murder nor the only person involved in the crime; Bulerin was both present and involved in other ways. Indeed, the very evidence cited by the Ohio Supreme Court to implicate Joseph also implicates Bulerin. The evidence that placed Joseph at the scene (witnesses saw Forest's car in front of Wireman's home) also put Bulerin at the scene, as the two men were driving around together in Forest's car the night of Young's disappearance and murder.[9] *Joseph II*, 653 N.E.2d at 289. The fact that Young's body was wrapped in Visqueen implicates Bulerin as well as Joseph, as both had access to the material. *Id.* at 289. And the fact that Young's body was discovered on Joseph's grandparents' property also implicates Bulerin as well as Joseph, as two days after the murder, both men talked to a coworker about hauling trash to that property. *Id.* at 290. There was other evidence of Bulerin's involvement, too: both Joseph and Bulerin often borrowed Forest's car and kept items in it, *id.* at 288, 289, and Bulerin changed the tires of

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[9] As we discuss below in the context of the *Brady* claim, there was also evidence that Forest was with Joseph and Bulerin that night. However, because the state failed to disclose this evidence, it was not before the jury, so we do not consider it here.

Forest's car the day after Young's disappearance even though they were new, *id.*

There was also evidence that Joseph and Bulerin, who shared a residence, *id.* at 288, were close. As Chief Justice Moyer demonstrated in dissent, their relationship supplied Bulerin with ample motive to kill Young:

> [T]estimony was presented that the co-defendant Bulerin . . . was highly involved with martial arts, and protective of "his kid" (Joseph). Forest confirmed that Bulerin had indicated that he would "either snap your neck or put a bullet through your head and throw you out alongside the road" if you ever "screwed with or messed with" him or Joseph. Joseph's mother testified that, on one occasion when her son was ill, Bulerin told her not to "waste [her] time" in attempting to take Joseph home with her because she "wasn't going to get [her] son." She testified that Bulerin had threatened to break into her home and take something, or kill her dogs. At Joseph's mitigation hearing, Bulerin's ex-wife testified that, while she could not believe Joseph actually killed Young, she could believe that behavior of Bulerin.

Id. at 301 (Moyer, C.J., dissenting) (second and third alterations in original).[10] In light of all this evidence connecting both Joseph and Bulerin to the murder, it is not surprising that the two men were jointly indicted. *Id.* at 290. Indeed, the state's entire theory of the case was that the two acted together.

Of course, the evidence of Bulerin's presence at the scene and other involvement does not rule out the possibility that Joseph was the actual killer. It means, however, that actual

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[10] Acting Justice Deshler and Justice (now U.S. Circuit Judge) Cook agreed with Chief Justice Moyer's sufficiency analysis, making the vote 4-3 on this issue.

killing cannot be attributed to Joseph simply because he was involved and present at the scene. *See Cunningham*, 824 N.E.2d at 512, 531; *Taylor*, 612 N.E.2d at 325. Because either of the two knife wounds in Young may have been fatal, the state had to prove that Joseph personally inflicted at least one of the wounds, but it offered no evidence of this whatsoever. In fact, the state conceded this very point during its closing argument: "The State of Ohio can't tell you. I wish I could. I wish I could tell you exactly what happened. I don't know who struck the death blow." 11 J.A. at 3907 (Trial Tr. at 1976). Thus, the evidence showed *at most* that Joseph "ha[d] hands-on involvement in a homicide," *Skatzes*, 819 N.E.2d 215, 240-41, which is insufficient to prove that he was the actual killer.

In light of the clear line of precedent requiring proof that Joseph was the actual killer, the equally clear precedent that the actual-killer element requires proof that the defendant personally inflicted the death blows in a situation where (as here) the defendant and a coconspirator are both present at the scene, and the total absence of such proof (accompanied by the state's concession that it could not offer such proof, to boot), we conclude that the Ohio Supreme Court's decision was an unreasonable application of the due-process standard of *Jackson v. Virginia*.[11]

B. Eighth Amendment Narrowing Requirement

Joseph also claims that his death sentence violates the Eighth Amendment, which forbids the infliction of "cruel and unusual punishments." U.S. CONST. amend. VIII. Specifically, Joseph contends that because he was not

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[11] In support of his *Jackson* claim, Joseph also argues that there was insufficient evidence of another element of the capital specification: that the aggravated murder occurred in relation to a kidnapping. Because we have already concluded that there was insufficient evidence of the principal-offender element of the capital specification, we need not address the sufficiency of the kidnapping element.

properly convicted pursuant to a correct capital specification, his death sentence fails to satisfy the Eighth Amendment's narrowing requirement. The Supreme Court has summarized this requirement as follows:

> To pass constitutional muster, a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983); cf. *Gregg v. Georgia*, 428 U.S. 153 (1976). Under the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. *Id.*, at 162-164 (reviewing Georgia sentencing scheme); *Proffitt v. Florida*, 428 U.S. 242, 247-250 (1976) (reviewing Florida sentencing scheme). By doing so, the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition. *Zant*, *supra*, 462 U.S., at 878 ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty").

Lowenfield v. Phelps, 484 U.S. 231, 244 (1988). The Ohio Court of Appeals, which was the last state court to issue a reasoned opinion on the issue, rejected Joseph's claim because it concluded that the jury had properly found Joseph guilty of the principal-offender specification. *Joseph I*, 1993 WL 531858, at *23-*24.

We recently granted habeas relief on the basis of a violation of the Eighth Amendment narrowing requirement. In *Esparza v. Mitchell* (*Esparza I*), 310 F.3d 414 (6th Cir. 2002), we reviewed an Ohio conviction in which a death sentence was imposed even though the indictment did not

charge a capital specification, the trial court did not instruct the jury on a capital specification, and the jury did not return a verdict on a capital specification. *Id.* at 416. Instead, "the state courts, on their own initiative, after the jury trial and verdict, found the petitioner Esparza guilty of the [specification] that made him eligible for the death penalty, i.e., being the 'principal offender' in committing an aggravated murder while committing a robbery."[12] *Id.* at 417. We concluded that imposing a death sentence even though "the jury never found the statutorily required [capital specification] . . . . is unquestionably a violation of the Eighth Amendment." *Id.* at 420. We further held that the Eighth Amendment error was not subject to harmless-error analysis. *Id.* at 421-22.

The thrust of Joseph's argument is that his case is materially indistinguishable from *Esparza I*. We agree. Given the pervasive misunderstanding of the capital specification at Joseph's trial, it is clear that Joseph's death sentence was imposed pursuant to a jury verdict that he was "the principal offender in the commission of the kidnapping" rather than a jury verdict that he was "the principal offender in the commission of the aggravated murder." In other words, Joseph's death sentence was imposed pursuant to a jury finding of an invented-on-the-fly capital specification that does not exist in Ohio's statutory code rather than a jury finding of the statutory capital specification in OHIO REV. CODE § 2929.04(A)(7). As in *Esparza I*, "the jury never found the statutorily required [capital specification]," so the imposition of the death penalty "is unquestionably a violation of the Eighth Amendment." 310 F.3d at 420.

We recognize, of course, that the Supreme Court reversed *Esparza I*. *See Mitchell v. Esparza* (*Esparza II*), 540 U.S. 12

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[12] Note that this was the same specification — § 2929.04(A)(7) — at issue in the instant case.

(2003). Yet that reversal was in response to our holding that the Eighth Amendment violation was not subject to harmless-error analysis. *See Esparza II*, 540 U.S. at 16-17. The Supreme Court did *not* disturb our conclusion that a constitutional violation occurred. Thus, we follow *Esparza I*'s Eighth Amendment analysis and conclude that the narrowing requirement was violated here.

We now turn to the harmless-error analysis mandated by the Supreme Court in *Esparza II*. The Court's analysis in that case is instructive. The Court reasoned that the jury "would surely have" returned a guilty verdict on a principal-offender specification because Esparza "was the only defendant charged in the indictment" and "[t]here was no evidence presented that anyone other than [Esparza] was involved in the crime or present at the [scene of the murder]." *Esparza II*, 540 U.S. at 18. Thus, the state court's conclusion that the errors were harmless was not objectively unreasonable under AEDPA. *Id.* at 19; *accord Biros v. Bagley*, 422 F.3d 379, 388 (6th Cir. 2005) (stating in dictum that an Eighth Amendment violation was harmless because it was undisputed that the petitioner acted alone), *cert. denied*, 75 U.S.L.W. 3167 (U.S. Oct. 2, 2006) (No. 05-11394). Both factors in the Court's analysis cut the other way here: another person (Bulerin) was charged in the indictment, and there was significant evidence that another person (Bulerin) was involved in the crime and present at the scene of the murder. Thus, *Esparza II* itself strongly supports the conclusion that the Eighth Amendment error was *not* harmless in the instant case.

Accordingly, we conclude that the state court unreasonably applied clearly established federal law in concluding that Joseph's sentence satisfied the Eighth Amendment narrowing requirement.

C. Flawed Indictment, Erroneous Jury Instructions, and Ineffective Assistance of Counsel

In addition to the *Jackson* claim already discussed above, Joseph argues that his due process rights were violated in two other ways: by being tried pursuant to an indictment and jury instructions that incorrectly stated the only capital specification with which he was charged. Joseph did not, however, object at trial to either the indictment or the jury instructions. Accordingly, the Ohio Supreme Court deemed these claims waived and reviewed only for plain error. *Joseph II*, 653 N.E.2d at 291, 294. We recently held in similar circumstances that a prisoner had procedurally defaulted his claims. *See Biros*, 422 F.3d at 386-87. Thus, Joseph has procedurally defaulted his indictment and jury-instruction claims, and "federal habeas review of the claims is barred unless [Joseph] can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

1. Cause and Prejudice/Ineffective Assistance of Counsel

We note at the outset that "[s]o confident is the government of the correctness of its [cause-and-prejudice] argument that it has not deigned to respond to the merits of the appeal. This was a tactical error. The government's confidence is unwarranted." *Pasha v. Gonzales*, 433 F.3d 530, 532 (7th Cir. 2005). For the following reasons, Joseph has established cause and prejudice to excuse his procedural default.

Constitutionally "[i]neffective assistance of counsel . . . is cause for a procedural default." *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *see also Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) ("Not just any deficiency in counsel's performance will do . . . ; the assistance must have been so

ineffective as to violate the Federal Constitution. In other words, ineffective assistance adequate to establish cause for the procedural default of some *other* constitutional claim is *itself* an independent constitutional claim." (citation omitted)). Joseph argues that his procedural default should be excused because his trial counsel provided constitutionally ineffective assistance by failing to object to the flawed indictment and erroneous jury instructions. Joseph also claims the ineffective assistance of counsel ("IAC") as an independent claim for habeas relief.[13] Although Joseph must satisfy the AEDPA standard with respect to his independent IAC claim, he need not do so to claim ineffective assistance for the purpose of establishing cause. *See Fischetti v. Johnson*, 384 F.3d 140, 154-55 (3d Cir. 2004). For the reasons discussed below, Joseph has established his IAC claim under the AEDPA standard, which necessarily means that he has also established ineffective assistance for the purpose of establishing cause.

IAC claims are governed by the test enunciated in the clearly established Supreme Court precedent of *Strickland v. Washington*, 466 U.S. 668 (1984). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Performanee is measured against "an objective standard of reasonableness," "under prevailing professional norms." *Id.* at 688. The second component of a *Strickland* claim is a "show[ing] that the deficient performance prejudiced the defense." *Id.* at 687. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the

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[13] It is undisputed that Joseph presented this independent claim to the Ohio courts. He has therefore satisfied the "general[] require[ment] that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Carrier*, 477 U.S. at 489.

result of the proceeding would have been different." *Id.* at 694. A reasonable probability is less than a preponderance of the evidence, as "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. Instead, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

The Ohio Court of Appeals, which was the last state court to issue a reasoned opinion on the issue, gave the following reasons for rejecting the argument that Joseph's counsel was ineffective for failing to object to the flawed indictment and erroneous jury instructions:

> The flaw in the specification is very technical in nature, albeit the effect of this flaw has been an issue of significant importance to the case. This flaw in the precise wording of the specification was so subtle that neither the attorneys for the State nor the trial judge noticed it. Defense counsel's failing to notice this flaw does not rise to the level of deficient performance.
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> . . . Simply failing to object to an alleged error is insufficient to sustain a claim of ineffective assistance of counsel, unless it is also shown that counsel violated an essential duty owed the client. The [failure to object to the jury instructions] do[es] not amount to deficient conduct resulting in prejudice affecting the fairness of [Joseph's] trial.

Joseph I, 1993 WL 531858, at *26.[14]

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[14] The state court appears to have (briefly) addressed both *Strickland* prongs with respect to the failure to object to the jury instructions, but only the performance prong with respect to the failure to object to the indictment. Thus, the AEDPA standard applies to these analyses but not to the *Strickland* prejudice issue with respect to the failure to object to the

A number of recent cases have emphasized that defense attorneys have a constitutional duty to conduct adequate factual investigations. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003). Yet it can hardly be doubted that defense lawyers have a constitutional obligation to investigate and understand the *law* as well. *See, e.g.*, *Williams*, 529 U.S. at 395 (noting that counsel "failed to conduct an investigation . . . not because of any strategic calculation but because they incorrectly thought that state law barred access to such records."); *Strickland*, 466 U.S. at 690 ("[S]trategic choices made after *thorough investigation of law* and facts relevant to plausible options are virtually unchallengeable . . . ." (emphasis added)); *Smith v. Dretke*, 417 F.3d 438, 442-43 (5th Cir. 2005) ("[Defense counsel] failed to achieve a rudimentary understanding of the well-settled law of self-defense in Texas. By doing so, he neglected the central issue in his client's case. . . . This misunderstanding could have been corrected with minimal legal research." (footnote omitted)).

Here, the principal-offender specification was the *only* capital specification with which Joseph was charged and therefore was the only reason Joseph faced the death penalty. Thus, it was obviously *the* critical issue in the case. Simply reading the statute would have revealed that the specification requires the defendant to be the principal offender in the commission of the aggravated murder, not of the kidnapping. And minimal case research would have revealed that being the principal offender in the commission of the aggravated

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indictment. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003) ("[O]ur review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis."); *Maples v. Stegall*, 340 F.3d 433, 437 (6th Cir. 2003). Nevertheless, because Joseph's claim succeeds under either de novo or AEDPA review, for the sake of simplicity we conduct the entire analysis under the § 2254(d)(1) standard.

murder means that the defendant must have "actually killed" the victim. Yet Joseph's trial counsel failed to grasp either of these two basic points, as evidenced by his failure to object to the flawed indictment and erroneous jury instructions. The complete lack of understanding was further confirmed by counsel's own repeated misstatements of the specification. And it was topped off by his failure to notice that the state conceded that it could not prove that Joseph actually killed the victim.

Understanding the elements of the specification that makes a defendant eligible for the death penalty is perhaps the most basic aspect of representing a capital defendant. We think this proposition obvious, but in any event it finds support in "the standards for capital defense work articulated by the American Bar Association (ABA) — standards to which [the Supreme Court] long ha[s] referred as 'guides to determining what is reasonable.'" *Wiggins*, 539 U.S. at 524 (quoting *Strickland*, 466 U.S. at 688). The ABA Guidelines provide that "[c]ounsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial." ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES § 11.4.1(A) (1989). Counsel must procure "[s]ources of investigative information," the first of which are the "charging documents," which "should be obtained and examined in the context of the applicable statutes and precedents, to identify . . . the elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable . . . ." *Id.* § 11.4.1(D)(1)(A).[15] In failing to understand even the basic elements of the principal-offender

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[15] The most recent version of the ABA Guidelines is substantially similar. *See* ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES § 10.7(A) & cmt. (rev. ed. 2003).

specification, the performance of Joseph's trial counsel was constitutionally deficient.

The state court attempted to diminish the failures of Joseph's counsel by calling the error in the specification "technical" and "subtle." We think it inconceivable that a reasonable criminal defense attorney would find the difference between "kidnapping" and "aggravated murder" too technical and subtle, especially when this distinction provides the sole basis for receiving the "death penalty" rather than a "life sentence." Under the state court's unreasonably low performance standard, criminal defense lawyers might also be permitted to confuse "misdemeanor" and "felony," the "Fourth" and "Fifth" Amendments, or even "guilty" and "not guilty." Fortunately for Joseph and other criminal defendants, the prevailing professional norms under which *Strickland* performance is judged are not as low as the state court would have them.

The state court also attempted to minimize the deficiency of Joseph's counsel by noting that he was not the only one to misunderstand the specification — the prosecution and the trial judge similarly erred. We fail to see how the pervasiveness of the error excuses Joseph's counsel's performance. After all, Joseph was represented — and consequently was owed a constitutionally sufficient level of performance — by his counsel, not by the prosecution or the trial judge. Furthermore, when the prosecution and the trial judge are operating under a mistaken view of the law, the performance of defense counsel becomes *more* important, because he is then the only one left to correct the misunderstanding. Accordingly, we conclude that the state court unreasonably applied *Strickland* in concluding that the performance of Joseph's trial counsel was constitutionally adequate.

The prejudice inquiry is similarly straightforward. If Joseph's trial counsel had objected to the flawed indictment

and erroneous jury instruction, then the players at trial would not have labored under an incorrect understanding of the capital specification, and there is a reasonable probability that the outcome would have been different (i.e., that Joseph would not have received a death sentence), in at least three identifiable ways. First, there is a reasonable probability that the prosecution, which conceded that it could not prove that Joseph actually killed the victim, would have declined to charge Joseph with the specification. Second, there is a reasonable probability that, given the prosecution's concession that it could not prove that Joseph actually killed the victim, a properly instructed jury would have found Joseph not guilty of the specification. Third, even if the jury still found Joseph guilty of the specification, there is a reasonable probability that a trial judge with a proper understanding of the specification would have intervened, either by setting aside the verdict after the guilt phase or by rejecting the jury's recommendation of a death sentence after the penalty phase. Thus, we have little trouble concluding that Joseph's defense was prejudiced by his trial counsel's deficient performance, and that the state court unreasonably applied *Strickland* in concluding otherwise.

Having determined that habeas relief is warranted on Joseph's independent IAC claim, it necessarily follows that Joseph has established cause to excuse the procedural default of his indictment and jury-instruction claims. Of course, Joseph must also establish the prejudice component of cause and prejudice. The Supreme Court has declined to provide a general definition of "prejudice" for purposes of cause and prejudice. *United States v. Frady*, 456 U.S. 152, 168 (1982). Nevertheless, the Court has given some instructive content to the term by explaining that one way to establish the prejudice component of cause and prejudice is to establish *Brady* materiality. *Banks v. Dretke*, 540 U.S. 668, 691, 698 (2004); *Strickler v. Greene*, 527 U.S. 263, 282 (1999). Given that *Strickland* prejudice is governed by a standard worded

similarly to the *Brady* materiality standard, *compare Kyles v. Whitley*, 514 U.S. 419, 433 (1995) ("[F]avorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (internal quotation marks omitted)), *with Strickland*, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."),[16] it follows that establishing *Strickland* prejudice likewise establishes prejudice for purposes of cause and prejudice. *Mincey v. Head*, 206 F.3d 1106, 1147 n.86 (11th Cir. 2000), *cert. denied*, 532 U.S. 926 (2001); *Prou v. United States*, 199 F.3d 37, 49 (1st Cir. 1999). Thus, Joseph has established cause and prejudice to excuse his procedural default.

We may now turn to the merits of Joseph's indictment and jury-instruction claims. As we noted above, the state declined to argue the merits of these claims. Therefore, it is not clear that the state is even appealing the district court's resolution of the merits in Joseph's favor. Accordingly, we discuss the merits (which we affirm) only briefly.

2. Flawed Indictment

"No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that

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[16] This similar wording is, of course, no coincidence. The Court explicitly acknowledged in *Strickland* that its "test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution." 466 U.S. at 694 (citing *United States v. Agurs*, 427 U.S. 97, 104, 112-13 (1976)). A majority of the Court then imported "the *Strickland* formulation of the *Agurs* test for materiality" back into *Brady* doctrine. *United States v. Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J., joined by O'Connor, J.); *see also id.* at 685 (White, J., joined by Burger, C.J., and Rehnquist, J., concurring in part and concurring in the judgment) (agreeing with the standard).

charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *see also Valentine v. Konteh*, 395 F.3d 626, 631 (6th Cir. 2005) ("[A]n indictment is only [constitutionally] sufficient if it (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy.").[17] "These fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial." *Presnell v. Georgia*, 439 U.S. 14, 16 (1978). Joseph claims that he was denied due process because the flawed indictment failed to give him adequate notice of the capital specification. The Ohio Supreme Court acknowledged the error in the indictment, but it concluded that Joseph had received sufficient notice of the correct capital specification and that the error had not prejudiced his defense. *Joseph II*, 653 N.E.2d at 291-92.

Joseph principally relies on *Lucas v. O'Dea*, 179 F.3d 412 (6th Cir. 1999). There, a person was shot and killed in the course of a robbery committed by Lucas and two other men. Lucas was indicted for intentional murder, which required proof that he shot the victim. The only witness testified that he did not know which of the robbers fired the fatal shot, and Lucas's entire defense was that he did not shoot the victim. Despite the intentional-murder charge in the indictment, the jury was given instructions for wanton murder, for which it was immaterial who fired the shot. The state supreme court upheld the conviction, characterizing it as a conviction for wanton murder. We concluded that in

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[17] It seems clear that Joseph's indictment fails the requirement of containing the elements of the charged offense, as the capital specification omitted the element of being the principal offender in the commission of the aggravated murder. Nevertheless, Joseph has not made this claim, so we do not reach it.

these circumstances, Lucas had been "deprived . . . of his Fourteenth Amendment right to notice of the charges against him." *Id.* at 417. We conclude likewise here: much as Lucas was indicted for one crime (intentional murder) but convicted of another (wanton murder), Joseph, too, was indicted for one asserted capital specification (being the principal offender in commission of the kidnapping) but convicted of another (being the principal offender in the commission of the aggravated murder). Indeed, the lack of notice is arguably even worse here, as Joseph was initially indicted under a specification that did not even exist.

In granting relief on this claim, the district court, relying on *United States v. Ford*, 872 F.2d 1231, 1235-36 (6th Cir. 1989) (explaining that an amendment to an indictment is prejudicial per se), *cert. denied*, 498 U.S. 843 (1990), held that the error in Joseph's indictment was not subject to harmless-error review. The district court held in the alternative that the error was not harmless in this case. Given the Supreme Court's decision in *Esparza II* (discussed above), we think it prudent to engage in the harmless-error analysis.[18] For the reasons similar to those that have already been discussed above, we conclude that the due-process violation "had substantial and injurious effect or influence in determining the jury's verdict," *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (internal quotation marks omitted), and therefore was not harmless. Moreover, it was objectively unreasonable for the state court to conclude otherwise.

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[18] We note that the Supreme Court recently granted certiorari with respect to "[w]hether the omission of an element of a criminal offense from a federal indictment can constitute harmless error." *United States v. Resendiz-Ponce*, — U.S. —, 126 S. Ct. 1776 (2006). The outcome of *Resendiz-Ponce* might affect whether defective *state* indictments like the one here are subject to harmless-error analysis, although even that is not certain because federal and state indictments are not necessarily subject to the same requirements. *See Apprendi v. New Jersey*, 530 U.S. 466, 477 n.3 (2000) (noting that the Fifth Amendment's Indictment Clause has not been incorporated against the states).

3. Erroneous Jury Instructions

Supreme Court precedent clearly establishes that "[i]n a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement." *Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (citing *Sandstrom v. Montana*, 442 U.S. 510, 520-21 (1979)). "The only question . . . is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.' It is well established that the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (citations omitted) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). Joseph's jury-instruction claim is based, of course, on the erroneous principal-offender instruction.

The Ohio Supreme Court's rejection of Joseph's claim was premised on the idea that because the trial court read the correct specification once, it cured any error in the instructions. *Joseph II*, 653 N.E.2d at 294-95. We conclude that this decision is both contrary to and an unreasonable application of clearly established federal law. The decision is contrary to Supreme Court precedent in that it ignored the approach that the Court has explicitly articulated for this type of claim. *See Williams*, 529 U.S. at 405 ("A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases."). By excusing the error solely on the basis of the single instance in which the trial court read the correct specification, the state court "judged in artificial isolation" that one correct reading, virtually ignoring "the context of the instructions as a whole and the trial record," i.e., the countless times that the incorrect specification was stated or referenced. *McGuire*, 502 U.S. at 72 (internal quotation marks omitted).

The state court also unreasonably applied clearly established federal law. The jury instructions repeatedly and incorrectly stated (either explicitly or by reference to earlier misstatements) that the capital specification required proof that Joseph was the principal offender in the commission of the kidnapping. Thus, the instructions omitted the element of being the principal offender in the commission of the aggravated murder, i.e., that Joseph "actually killed" the victim, which means that they "fail[ed] to give effect to th[e] [due-process] requirement" that "the State must prove every element of the offense." *McNeil*, 541 U.S. at 437. The rest of "the trial record," *McGuire*, 502 U.S. at 72, compounded the error in the jury instructions, as both the prosecution and Joseph's counsel repeatedly misstated the specification in their opening statements and closing and rebuttal arguments. The single instance in which the trial court correctly read the specification to the jury was insufficient to cure the pervasive errors elsewhere in the instructions and the rest of the proceedings. *See Francis v. Franklin*, 471 U.S. 307, 322 (1985) ("Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict."); *Laird v. Horn*, 414 F.3d 419, 427-28 (3d Cir. 2005) ("[W]e can not conclude that such a brief reference to the required *mens rea* for first-degree murder remedies the incorrect and misleading portion of the instruction."), *cert. denied*, — U.S. —, 126 S. Ct. 1143 (2006); *Everett v. Beard*, 290 F.3d 500, 512 (3d Cir. 2002) ("The mere fact that the law was correctly stated in one part of the charge will not automatically insulate the charge from a determination of error."), *cert. denied*, 537 U.S. 1107 (2003). Once again, for reasons that have been discussed at length, the due-process violation was not harmless. *See Brecht*, 507 U.S. at 623.

IV. CLAIMS ATTACKING THE AGGRAVATED-MURDER CONVICTION

The district court denied each of Joseph's claims attacking the underlying aggravated-murder conviction. Joseph pursues four of these claims on appeal, arguing that (1) the trial court admitted statements obtained by the police in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966); (2) the refusal to grant a change of venue on the grounds of pretrial publicity resulted in the denial of Joseph's Sixth Amendment right to an impartial jury; (3) the prosecution suppressed material exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and (4) the prosecution made numerous improper statements amounting to misconduct in violation of the Due Process Clause. For the reasons below, we affirm the district court's denial of these claims.

A. *Miranda*

Before the state courts, Joseph challenged the admission of four statements on *Miranda* grounds. The Ohio Court of Appeals, which was the last state court to issue a reasoned opinion on this claim, gave the following account of the circumstances surrounding these statements:

> At approximately 5:00 a.m. on June 27, 1990, the morning Ryan was discovered missing, three deputy sheriffs went to [Joseph's] residence. [Joseph] and Bulerin came to the door, where [Joseph] was questioned. [Joseph] disclaimed any knowledge of the disappearance. [Joseph] was then transported to the sheriff's office by one of the deputies. At the sheriff's office [Joseph] waited for the arrival of Detective Cheney. He was read his *Miranda* rights and signed a waiver of rights form prior to any questioning. This interview lasted approximately twenty minutes, after which time [Joseph] left. *Later that morning he was again taken to the sheriff's office by a deputy who*

> *picked him up from work. [Joseph] voluntarily agreed to go with the deputy to the sheriff's office where he was questioned a third time at approximately 10:15 a.m. [Joseph] was not under arrest and no* Miranda *warnings were given. Detective Ketchum, the deputy who interviewed [Joseph] this time, testified [Joseph's] statements were voluntary and he was free to leave at any time.* A fourth interview with [Joseph] was conducted after his arrest on the evening of July 4, 1990. He was informed of his rights which he chose to waive, and consented to the interview.

Joseph I, 1993 WL 531858, at *31 (emphasis added). Before this court, Joseph challenges only the third statement, the facts of which are emphasized in the quoted passage.

Miranda "held that certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in evidence." *Dickerson v. United States*, 530 U.S. 428, 431-32 (2000). There is no doubt that Joseph was interrogated by Detective Ketchum for purposes of *Miranda*. *See Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980) ("[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (footnote omitted)). And it is undisputed that Joseph was not given *Miranda* warnings before being interrogated. The critical question in the instant case, then, is whether Joseph was in custody, which under clearly established Supreme Court precedent depends on "whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (quoting *Oregon v. Mathiason*, 429

U.S. 492, 495 (1977)); *see also Thompson v. Keohane*, 516 U.S. 99, 112 (1995) ("[W]ould a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave[?]"). The state court answered this question in the negative.

Joseph first argues that the state court's decision was contrary to *Berkemer v. McCarty*, 468 U.S. 420 (1984), and *Stansbury v. California*, 511 U.S. 318 (1994). Under these cases, along with *Beckwith v. United States*, 425 U.S. 341 (1976), "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury*, 511 U.S. at 323 (explaining that *Beckwith* and *Berkemer* make this proposition clear).[19] According to Joseph, the state court's decision was contrary to these precedents because the court applied a subjective test for custody (based on Detective Ketchum's views) rather than the objective test mandated by the Supreme Court. *See Williams*, 529 U.S. at 405 ("A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases."). Yet the state court explicitly relied on *Berkemer* and stated the governing standard in objective terms: "the Supreme Court held the relevant inquiry regarding a custodial interrogation to be how *a reasonable person in the suspect's position would have understood his situation*." *Joseph I*, 1993 WL 531858, at *31 (emphasis added). Furthermore, the court principally discussed objective facts in applying the custody standard to the facts. *See id.* at *31-*32. Finally, to the extent that some of the facts mentioned by the court arguably

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[19] It is unproblematic that Joseph relies on *Stansbury* — a case that postdates the decision of the Ohio Court of Appeals — because *Stansbury* simply applied the clearly established precedents of *Beckwith* and *Berkemer*, both of which predated the Ohio court's decision. *See Stansbury*, 511 U.S. at 323 ("Our decisions make clear . . . .").

indicate the subjective views of the officers, it appears that they were either simply given as background or can also be read as indicating the subjective impressions of the officers *that were made known to Joseph*. Thus, we conclude that the state court's decision was not contrary to clearly established federal law.

Joseph next argues that the state court unreasonably applied clearly established federal law. In *Yarborough v. Alvarado*, 541 U.S. 652 (2004), the Supreme Court recently reviewed a state court's application of the *Miranda* custody test under AEDPA's unreasonable-application prong, so we naturally begin our analysis there. The Court explained that whether a state court's application of clearly established federal law is "unreasonable" is a context-sensitive inquiry:

> [T]he range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

Id. at 664. Within this framework, the Court gave the state court considerable "leeway" because *Miranda*'s "custody test is general." *Id.* at 665. The Court noted that "certain facts weigh[ed] against a finding that [the defendant] was in custody" while "[o]ther facts point[ed] in the opposite direction." *Id.* at 664-65. Given "[t]hese differing indications," the Court concluded that "the state court's application of [clearly established federal] law fit[] within the

matrix of [the Court's] prior decisions" and therefore was reasonable. *Id.* at 665.

Here, too, there are "differing indications" of whether Joseph was in custody. On the one hand, Joseph was transported from his workplace to the sheriff's office by a deputy; Joseph had already been questioned by the police twice earlier that day; and Detective Ketchum never told Joseph that he was free to leave. On the other hand, Joseph went *voluntarily* with the deputy to the sheriff's office; Detective Ketchum never told Joseph that he was *not* free to leave; and the interview with Detective Ketchum was brief, lasting only twenty-five minutes. Were we reviewing Joseph's *Miranda* claim de novo, this might very well be a close case. That is not, however, the posture of this appeal. What the Supreme Court said in *Yarborough* is applicable here:

> We cannot grant relief under AEDPA by conducting our own Independent inquiry into whether the state court was correct as a *de novo* matter. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [the law] incorrectly." Relief is available under § 2254(d)(1) only if the state court's decision is objectively unreasonable. Under that standard, relief cannot be granted.

541 U.S. at 665-66 (alterations in original) (citations omitted) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002)).

B. Pretrial Publicity

Joseph argues that he was denied his Sixth Amendment right to be tried by an impartial jury because the jury in his case was infected by pretrial publicity surrounding the murder. We have explained that "there is clearly established Supreme Court precedent distinguishing between cases involving presumed prejudice — when the 'setting of the

trial [is] inherently prejudicial,' — and actual prejudice — when review of both the jury voir dire testimony and the extent and nature of the media coverage indicates 'a fair trial [was] impossible.'" *Nevers v. Killinger*, 169 F.3d 352, 364 (6th Cir. 1999) (alterations in original) (citations omitted) (quoting *Murphy v. Florida*, 421 U.S. 794, 798, 803 (1975)), *abrogated on other grounds by Harris v. Stovall*, 212 F.3d 940, 942-43 (6th Cir. 2000). The Ohio Court of Appeals, which was the last state court to issue a reasoned opinion on this issue, rejected both types of claims, principally on the basis of the jurors' responses during voir dire and the trial court's instructions to the jury. *See Joseph I*, 1993 WL 531858, at *6-*7.

Joseph makes a very narrow argument to this court, basically contending that "the trial court failed to perform a searching *voir dire*" and did not "determin[e] the specific influences on the jurors." Petitioner-Appellant First Br. at 83, 96; *see also id.* at 85 n.32, 94-95. In *Mu'Min v. Virginia*, 500 U.S. 415 (1991), the Supreme Court rejected the similar argument that a trial court must ask questions regarding the content of the news reports (i.e., what Joseph calls "the specific influences") to which potential jurors may have been exposed. *Id.* at 424-25. The Court explained that "8 of the 12 jurors who sat answered that they had read or heard something about the case, but none of those 8 indicated that he had formed an opinion as to guilt, or that the information would affect his ability to judge petitioner solely on the basis of the evidence presented at trial." *Id.* at 428. In the instant case, all twelve jurors had heard about the case, but each stated that he or she had formed no opinion on the case, could disregard the media accounts, and could decide the case based solely on the evidence presented at trial. Given that *Mu'Min* forecloses Joseph's argument, we cannot conclude that the state court's decision was contrary to or an unreasonable application of clearly established federal law.

C. *Brady*

1. Standard of Review

The Ohio Supreme Court rejected Joseph's *Brady* claim, which was principally based on the delayed disclosure of a grant of immunity that had been given to William Forest, a key witness for the prosecution. *Joseph II*, 653 N.E.2d at 292-93. If Joseph were now bringing the same *Brady* claim, i.e., one premised on the same suppressed evidence, then it would be a "claim that was adjudicated on the merits in State court proceedings," and we would review the state court's decision only for whether it "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). However, Joseph's current *Brady* claim is not the same as tHe one he brought before the state courts: he now relies on a different mix of suppressed evidence that includes some items discovered only during federal habeas proceedings. Thus, Joseph argues, his *Brady* claim was *not* "adjudicated on the merits in State court proceedings," and AEDPA's strict standard of review does not apply. We agree. In *Williams v. Coyle*, 260 F.3d 684 (6th Cir. 2001), *cert. denied*, 536 U.S. 947 (2002), we reviewed a *Brady* claim based on evidence disclosed during federal habeas proceedings "under pre-AEDPA standards because no state court reviewed the merits of that claim." *Id.* at 706; *see also Monroe v. Angelone*, 323 F.3d 286, 297-98 (4th Cir. 2003) (collecting cases); *Holland v. Jackson*, 542 U.S. 649, 653 (2004) (noting that "[w]here new evidence is admitted, some Courts of Appeals have conducted *de novo* review on the theory that there is no relevant state-court determination to which one could defer" and "[a]ssuming . . . that this analysis is correct and that it applies where . . . the evidence does not support a new claim but merely buttresses a previously rejected one"). Because AEDPA's standard of review does not apply here, we review the district court's factual findings for clear error, while whether a *Brady*

violation occurred is a mixed question of law and fact that we review de novo. *Williams*, 260 F.3d at 706.

2. Merits

The Supreme Court recently provided the following concise summary of *Brady* doctrine:

> In *Brady*, this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S., at 87. We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.*, at 682; see also *Kyles v. Whitley*, 514 U.S. 419, 433-434 (1995). Moreover, the rule encompasses evidence "known only to police investigators and not to the prosecutor." *Id.*, at 438. In order to comply with *Brady*, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Kyles*, 514 U.S., at 437.

Strickler v. Greene, 527 U.S. 263, 280-81 (1999). The Court also distilled the "three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Id.* at 281-82.

a. Favorable to the Accused

We first address whether the evidence on which Joseph relies was favorable to him:[20]

1. Forest's immunity agreement. This item, which was disclosed belatedly at trial, was obviously favorable to Joseph, as it could have been used to impeach Forest. As Seventh Circuit has explained:

> The prosecution's giving a witness benefits — leniency, cash, or anything else — can be used by a cross-examining defense counsel to undermine the witness in two. . . distinct ways. The first and most common is by showing that the benefits were given in return for the witness's providing testimony that would help the prosecution. He might have told the prosecutor what he would testify to if called and the prosecutor might have explicitly agreed to give him specified benefits if he testified consistently with his proffer. Or there might have been a tacit understanding that if his testimony was helpful to the prosecution, the state would give him a break on some pending criminal charge. . . . Express or tacit, either way there would be an agreement, it would be usable for impeachment, and it would have to be disclosed to the defense.

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[20] Joseph also refers to various items that are not in the record and therefore presumably cannot be located. The district court acknowledged some of these materials, but it did not include them in its analysis, apparently because they "b[ore] no consequence on the Court's decision with respect to this claim." 2 J.A. at 794 n.53. This statement appears to reflect the belief that a due process claim cannot be based on evidence that has not been located, which is incorrect because such a claim is cognizable under the failure-to-preserve-evidence doctrine of *Arizona v. Youngblood*, 488 U.S. 51 (1989), and *California v. Trombetta*, 467 U.S. 479 (1984). However, Joseph did not invoke this doctrine in his habeas petition and does not now do so on appeal, so he has not properly raised this claim.

Wisehart v. Davis, 408 F.3d 321, 323-24 (7th Cir. 2005) (citations omitted), *cert. denied*, — U.S. —, 126 S. Ct. 1617 (2006).

2. Transcript of Ketchum's post-arrest interview of Forest on July 4, 1990. In this interview, which was disclosed belatedly at trial, Forest stated that on the morning after the murder, Bulerin bought tires for a client's car. At trial, Forest testified that on the morning after the murder, Bulerin bought and changed the tires on Forest's car. Although these two statements are not directly contradictory, they are somewhat inconsistent. Accordingly, the evidence could have been used to impeach Forest and is favorable to Joseph.

3. Transcript of Dailey and Van Horn's interview of Forest on July 7, 1990. In this interview, which was disclosed belatedly at trial, Forest was asked, "When is the last time you're sure that knife was in your car?" In response, Forest said:

> Um . . . I've really never use - it usually rattles on my car, as I'm driving down the road. I haven't driven my car too much lately - but I know I've not seen it since . . . at least maybe - before . . . they claimed it was lost. I've just never really paid attention to it - plus I never have my car to drive it.

21 J.A. at 8340 (omissions in original). (The phrase "before . . . they claimed it was lost" refers to Bulerin telling Forest on Thursday, June 28, 1990 or Friday, June 29, 1990 that the knife was lost. 21 J.A. at 8339-40.) The import of this statement is that Forest could not precisely pinpoint when he last saw the knife in his car. Yet at trial, Forest definitively testified that the knife was in the car on June 26, 1990. Thus, the evidence could have been used to impeach Forest and is favorable to Joseph.

4. Notes of Cheney's interview of Forest on June 28, 1990. On its face, the single page of interview notes, which

was discovered during the federal habeas proceedings below, does not appear to contain any favorable information. Nor does Joseph explain how these notes are favorable to him.

5. Transcript of Van Horn's interview of Thad Randall Staley on June 27, 1990. In this interview, which was discovered during the federal habeas proceedings below, Staley (who knows Forest) stated that he saw a car that looked like Forest's being driven on Thayer Road — Wireman's residence was on Thayer Road — at about 1:50 AM on the night/morning of the murder. According to Staley, there were two or more people in the car, and the driver "kind of looked like" Forest. 21 J.A. at 8365. Although this evidence does not exculpate Joseph (he might have been one of the other people in the car), it suggests that Forest was involved in the murder by placing him in the car seen at the scene of the murder at approximately the right time. Thus, it could have been used to impeach Forest and is favorable to Joseph.

6. Notes of a statement made by Tony Newland on June 30, 1990. In this statement, which was discovered during the federal habeas proceedings below, Newland asserted that he saw Forest at a car wash "cleaning a car that matched the description . . . 'too' thoroughly." 21 J.A. at 8361. Whether this evidence is favorable to Joseph is a close question. On one hand, it does not exculpate Joseph and it is quite vague. On the other hand, it suggests that Forest was "covering up" evidence and therefore was involved in the murder. On balance, it probably could have been used to impeach Forest.

b. Materiality/Prejudice

There is no dispute as to the fact that these items were suppressed, so we proceed directly to the issue of materiality/prejudice. We conduct this inquiry mindful of the Supreme Court's admonition that "suppressed evidence [must be] considered collectively, not item by item," when

determining materiality/prejudice.[21] *Kyles*, 514 U.S. at 436; *accord, e.g.*, *Castleberry v. Brigano*, 349 F.3d 286, 291 (6th Cir. 2003). All five items of suppressed evidence that were favorable to Joseph were favorable in the sense that they would have impeached Forest. And viewed collectively, these items would have *strongly* impeached Forest, who was clearly a crucial trial witness for the prosecution.[22] We have little trouble assuming that, if all five items had been completely undisclosed, they certainly would have been material/prejudicial under *Brady*.

As we have already indicated, however, the three most strongly impeaching items — the immunity agreement, the

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[21] The district court instead took a bifurcated approach: it first determined with respect to the delayed disclosures that Joseph was not prejudiced by the delay before then concluding that the completely undisclosed evidence was not material/prejudicial. This approach arguably finds some support in our statements to the effect that *Brady* does not apply to delayed disclosures unless the delay itself causes prejudice. *E.g.*, *United States v. Bencs*, 28 F.3d 555, 560-61 (6th Cir. 1994), *cert. denied*, 513 U.S. 1117 (1995). Yet these cases are not quite on point, as they involved only delayed disclosures rather than a mix of belatedly disclosed and completely undisclosed evidence. We think the better approach is to apply the Supreme Court's command that "suppressed evidence [must be] considered collectively, not item by item," when determining materiality/prejudice, *Kyles*, 514 U.S. at 436, no matter whether the collection of evidence includes only completely undisclosed items, only belatedly disclosed items, or a mixture of the two. This is especially so given that the question of whether a delay causes prejudice is really just a type of inquiry into materiality. *See Norris v. Schotten*, 146 F.3d 314, 334 (6th Cir.), *cert. denied*, 525 U.S. 935 (1998).

[22] Forest testified that Joseph and Bulerin had access to Visqueen (the material in which Young's body was found) at the sand and gravel lot, that Joseph's and Bulerin's demeanors were unusual the morning after the kidnapping, that Bulerin changed the tires on Forest's car the morning after the murder, that a knife was kept in Forest's car and was in the car on the day of the murder, that Joseph and Bulerin kept a shovel in Forest's car, and that Joseph owned a black ninja mask like the one discovered near Young's body.

statement about Bulerin changing the tires, and the statement about the knife — were belatedly disclosed during trial rather than completely undisclosed. Thus, we must consider as part of the collective materiality inquiry the extent to which the delay prejudiced Joseph. *E.g.*, *United States v. Bencs*, 28 F.3d 555, 560-61 (6th Cir. 1994), *cert. denied*, 513 U.S. 1117 (1995). Here, the trial court implemented several measures to remedy the delay. The court gave the defense several days to review the belatedly disclosed documents and to conduct a deposition of Forest. The court also gave the defense the opportunity to re-call Forest at trial. The defense declined to do so, but there is no suggestion that this decision was the result of insufficient time to prepare; if the defense needed more time, it could have asked for a continuance. *See, e.g.*, *United States v. Holloway*, 740 F.2d 1373, 1381 (6th Cir.) ("[C]ounsel for [the defendant] made no request for . . . a continuance. In such a circumstance, we conclude that the timing of the disclosure did not prejudice [the defendant]."), *cert. denied*, 469 U.S. 1021 (1984); *United States v. Osorio*, 929 F.2d 753, 758 (1st Cir. 1991) ("Generally, we have viewed the failure to ask for a continuance as an indication that defense counsel was himself satisfied he had sufficient opportunity to use the evidence advantageously."). In fact, it appears that the defense declined to re-call Forest for strategic reasons, 10 J.A. at 3795 (Trial Tr. at 1871), so that choice cannot now be used to attempt to magnify the prejudice of the delay. *See United States v. Davis*, 306 F.3d 398, 421 (6th Cir. 2002) (holding that there was no prejudice from a delayed disclosure where the "[d]efendant was given every opportunity to review the [newly disclosed] tapes and to recall [the witness] if necessary, but he refused to do so"), *cert. denied*, 537 U.S. 1208 (2003). Furthermore, the defense emphasized in its closing argument that "Forest was given immunity and released from jail for his testimony" and that his testimony therefore should be viewed "very cautiously." 11 J.A. at 3956 (Trial Tr. at 2025). Finally, the trial court instructed the jury at the close of trial: "If you find that

immunity has been granted to any witness, the credibility of such testimony must be examined with greater scrutiny than testimony of an ordinary witness." 11 J.A. at 3988-89 (Trial Tr. at 2057-58). These remedial measures reduced the potential materiality/prejudice of the delay in disclosing these three pieces of evidence.[23]

Finally, we add the two completely undisclosed items to the mix. These items were only weakly impeaching, and they would have added little to the impeachment of Forest if Joseph had taken advantage of the ample opportunity to use the belatedly disclosed evidence. Given that Joseph could have (but declined) to make use of the items that would have strongly impeached Forest after they were belatedly disclosed and that the completely undisclosed items would have only weakly impeached Forest, we cannot conclude that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433-34.

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[23] Joseph argues that if not for the delay, he would have prepared differently for voir dire, opening statements, and cross-examination of other witnesses. In other words, he claims that he was prevented from preparing a coordinated defense centered around attacking Forest's credibility. Some circuits have phrased the delayed-disclosure tests in terms of the defendant's ability to prepare for trial. *See United States v. Ingraldi*, 793 F.2d 408, 411-12 (1st Cir. 1986); *United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir.), *cert. denied*, 429 U.S. 924 (1976); *United States v. Miller*, 529 F.2d 1125, 1128 (9th Cir.), *cert. denied*, 426 U.S. 924 (1976). This court has not, however, endorsed such a formulation. Rather, we have expressly recognized the Supreme Court's explicit rejection of the argument that "the [materiality] standard should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial," *United States v. Agurs*, 427 U.S. 97, 112 n. 20 (1976). *See Norris*, 146 F.3d at 334; *Bencs*, 28 F.3d at 560.

D. Prosecutorial Misconduct

Joseph's final claim is that the prosecution violated his right to due process by committing misconduct. The Ohio Court of Appeals, which was the last state court to issue a reasoned opinion on the issue, rejected Joseph's various sub-claims because the prosecution's conduct was either not improper or did not prejudice Joseph. *Joseph I*, 1993 WL 531858, at *16-*18. We review Joseph's claim using the following approach:

> On habeas review, claims of prosecutorial misconduct are reviewed deferentially. To be cognizable, the misconduct must have "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Even if the prosecutor's conduct was improper or even "universally condemned," we can provide relief only if the statements were so flagrant as to render the entire trial fundamentally unfair. Once we find that a statement is improper, four factors are considered in determining whether the impropriety is flagrant: (1) the likelihood that the remarks would mislead the jury or prejudice the accused, (2) whether the remarks were isolated or extensive, (3) whether the remarks were deliberately or accidentally presented to the jury, and (4) whether other evidence against the defendant was substantial.

Bowling v. Parker, 344 F.3d 487, 512-13 (6th Cir. 2003) (citations omitted) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)), *cert. denied*, 543 U.S. 842 (2004). We discuss the propriety of each complained-of statement before considering the effect of improper ones (if any) collectively.

Joseph first argues that the prosecution commented on Joseph's failure to take the stand when it said, "[Joseph's counsel] would have you infer that there was no kidnapping. Well, you, ladies and gentlemen of the jury, heard all of the evidence. You heard each and every thing that would go to

show kidnapping. Uncontroverted. Uncontroverted from that witness stand." 11 J.A. at 3971 (Trial Tr. at 2040). "The law is clear that the prosecution cannot comment on a defendant's decision not to testify at trial." *Bowling*, 344 F.3d at 514 (citing *Griffin v. California*, 380 U.S. 609, 615 (1965)). However, "'[g]eneral references to evidence as uncontradicted, while not recommended, may not reflect on the defendant's failure to testify where witnesses other than the defendant could have contradicted the evidence.'" *Byrd v. Collins*, 209 F.3d 486, 534 (6th Cir. 2000) (quoting *Raper v. Mintzes*, 706 F.2d 161, 164 (6th Cir. 1983)), *cert. denied*, 531 U.S. 1082 (2001). Moreover, the comment was neither flagrant nor repeated. Finally, the trial court instructed the jury about Joseph's right not to testify.

Joseph next contends that the prosecution shifted the burden of proof to him when it asked, "What evidence do we have, ladies and gentlemen, that this defendant didn't do it?" 11 J.A. at 3977 (Trial Tr. at 2046). "[I]t [is] improper for the prosecutor to suggest that the defendant ha[s] the burden of proof or any obligation to produce evidence to prove his innocence." *United States v. Clark*, 982 F.2d 965, 968-69 (6th Cir. 1993). However, the trial court immediately sustained an objection to the question and instructed the jury to disregard it. The court also instructed the jury about the state's burden of proof.

Joseph also claims that the prosecution improperly expressed personal opinions. Specifically, the prosecution vouched for Forest's credibility and otherwise repeatedly prefaced statements with "I believe" or "I think." These comments certainly were improper, *see United States v. Young*, 470 U.S. 1, 18-19 (1985); *Bates v. Bell*, 402 F.3d 635, 644 (6th Cir.), *cert. denied*, — U.S. —, 126 S. Ct. 163 (2005), but they did not rise to the level of a due-process violation. With respect to the vouching for Forest, the prosecution was arguably simply noting the consistency between his testimony and other evidence, and in any event

the vouching was isolated. With respect to the repeated use of "I believe" and "I think," it does not appear that the prosecution was acting intentionally in an attempt to influence the jury; instead, the phrases appeared to be the result of a nervous habit. Furthermore, the trial judge repeatedly chastised the prosecution for its locution and instructed the jury to disregard expressions of personal belief.

Joseph next asserts that the prosecution elicited testimony from two witnesses that was inconsistent with prior statements they had made prior to trial: Forest testified definitively at trial that the knife was in the car on June 26, 1990, even though he had previously given a statement that he could not precisely pinpoint when he last saw the knife in his car; and the coroner testified at trial that she could not definitively say whether the cuts on Young's neck were inflicted pre- or postmortem, even though she had previously given a statement that the cuts were probably inflicted postmortem. "Misrepresenting facts in evidence can amount to substantial error because doing so 'may profoundly impress a jury and may have a significant impact on the jury's deliberations.'" *Washington v. Hofbauer*, 228 F.3d 689, 700 (6th Cir. 2000) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 646 (1974)). "For similar reasons, asserting facts that were never admitted into evidence may mislead a jury in a prejudicial way." *Id.* (citing *Berger v. United States*, 295 U.S. 78, 84 (1935)). The difficulty with Joseph's argument is that neither of these claims apply. The prosecution did not "assert[] facts that were never admitted into evidence": it elicited trial testimony from witnesses, so the facts in their testimony *were admitted into evidence*. Nor did the prosecution "[m]isrepresent[] facts in evidence": after eliciting trial testimony from witnesses, it simply relied on those facts in its arguments. Joseph's real quarrel is that the prosecution possessed but did not disclose prior statements that were inconsistent with the testimony elicited at trial. But

that claim sounds in a different type of prosecutorial misconduct: *Brady* doctrine.[24]

Finally, Joseph complains that when mitigation witnesses testified about Joseph's childhood and learning disability, on a few occasions the prosecution cross-examined them by asking what hose topics had to do with the kidnapping. Joseph argues that in doing so, the prosecution improperly suggested that the jury could not consider certain mitigating evidence. Although it is unconstitutional for "a prosecutor's comments . . . to 'constrain the manner in which the jury was able to give effect' to mitigating evidence, *DePew v. Anderson*, 311 F.3d 742, 748 (6th Cir. 2002) (quoting *Buchanan v. Angelone*, 522 U.S. 269, 277 (1998)), *cert. denied*, 540 U.S. 888 (2003), the prosecution's questions here did not rise to that level. In any event, the trial court gave the jury a proper instruction on the consideration of mitigating evidence.

It is clear that the prosecution made some improper statements and other questionable ones. Viewed collectively, they very well may have violated due process as a de novo matter. However, because some comments were isolated, inadvertent, or not flagrant, and because the trial court consistently gave curative instructions, we conclude that the state court's rejection of Joseph's prosecutorial misconduct claim was neither contrary to nor an unreasonable application of clearly established federal law.

V. CONCLUSION

For the reasons set forth above, we **AFFIRM** the grant of a writ of habeas corpus.

---

[24] Joseph relied on Forest's but not the coroner's prior statement in support of his *Brady* claim, which we rejected for the reasons above. We express no opinion as to whether Joseph's *Brady* claim would have succeeded had he also relied on the coroner's statement.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RICHARD JOSEPH	:	CASE NO. 1 :98 CV 527
Petitioner	:	
vs.	:	MEMORANDUM OF
RALPH COYLE, Warden	:	OPINION AND ORDER
Respondent	:	

UNITED STATES
DISTRICT JUDGE
LESLEY WELLS

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III. CONCLUSION 213

On 22 January 1991, a jury found Richard Joseph guilty of the aggravated murder of Ryan Young with a capital specification. On 30 January 1991, the same jury recommended imposition of the death penalty, and the state trial judge adopted this recommendation, sentencing Mr. Joseph to death. Mr. Joseph's direct appeals and petition for post-conviction relief to the Ohio courts were unsuccessful.

Before the Court is Mr. Joseph's Second Amended Petition for a writ of habeas corpus. (Docket #83). A Second Amended Return of Writ and Second Amended Traverse have been filed. (Docket #85 and #89). Mr. Joseph's Third Motion to Supplement the Record and Amended Motion for an Evidentiary Hearing also are pending. (Docket #87 and #88). Although the State has not filed a response to the motion to supplement the record, it has filed an opposition to the motion for an evidentiary hearing. (Docket #90).

A federal court's review of a habeas corpus petition is very different from a state court's review on direct appeal. The Antiterrorism and Effective Death Penalty Act of 1996 limits a federal district court's ability to grant a writ of habeas corpus where a state court considered the federal claim on the merits. When a federal court examines a state court's legal decision, the question is not whether the state court's decision was incorrect, but whether the decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d). It is not enough that a federal court disagrees with a state court decision; to grant a petition for a writ of habeas corpus, the federal court must find that the state court's decision was objectively unreasonable. In order to assess the reasonableness of a state court decision, a federal district court must examine the entire state record for itself.

For the reasons discussed below, upon full review of the record, this Court will grant in part and deny in part Mr. Joseph's petition for a writ of habeas corpus. Finding Mr. Joseph's challenges to the constitutionality of the imposition of the death penalty well-taken, the Court grants Mr. Joseph's petition based on his first, second, and portions of his eighth and nineteenth grounds for relief. Because the Court concludes that Mr. Joseph's remaining grounds for relief lack merit, it will not disturb his underlying conviction for aggravated murder.

Accordingly, the Court will issue a writ of habeas corpus ordering that Mr. Joseph's sentence of death be vacated and a new sentence of life imprisonment be imposed, as mandated by O.R.C. § 2929.03(A).

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Murder, Investigation, and Trial

1. Facts of the Crime

The Supreme Court of Ohio began its opinion on direct appeal with a statement of facts. State v. Joseph, 73 Ohio St.3d 450 (1995). This statement of facts is set forth below, interspersed as noted with additional details and clarification.

> During the fall of 1989 . . . Richard E. Joseph, began dating Cara M. Wireman. They began to date steadily until sometime in February 1990. Cara decided to end the relationship because she did not like the way [Joseph] treated her and she attended her senior prom with someone else. In April, Cara started dating the victim, Ryan Young, a student at the same high school. Ryan and [Joseph] knew each other from playing together on the school football team.
>
> Cara testified that [Joseph] was jealous of Ryan's relationship with her. [Joseph] wanted her to stop seeing Ryan so they could renew their relationship. This was evidenced by several letters [Joseph] wrote

> to Cara indicating his jealousy and desire to continue dating Cara. In one letter, he indicated he had been secretly watching Cara and Ryan together for three hours. Cara knew that martial arts played a big part in [Joseph's] life and she had previously seen him with guns and knives.
>
> On Monday, June 25, 1990, the day prior to the kidnapping, Cara and Ryan observed [Joseph] driving around in the area where Cara and Ryan both lived. Cara indicated she did not normally see [Joseph] driving in this area.

Ms. Cara Wireman had been driving Mr. Ryan Young from his house. (Tr. 1290). When she stopped at a stop sign on Thayer Road, she saw Mr. Joseph drive past. (Tr. 1290). Later that afternoon, Ms. Wireman and Mr. Young were at her home and saw Mr. Joseph drive by the house. (Tr. 1290). Both times Mr. Joseph was driving his purple-colored car. (Tr. 1291).

> On Tuesday, June 26, 1990, Ryan asked his mother if he could go to Cara's house, and he left around seven o'clock that evening driving his father's 1981 Oldsmobile. Ryan's mother received a telephone call from Ryan about 10:30 p.m. that evening and, during that conversation, she told him he could stay and finish watching the movie and then come straight home.
>
> Cara's next-door neighbor, Rose Fetter was outside walking her dog at about 11: 15 p.m. that night, when she observed a clean white car driving slowly down Thayer Road. There were two occupants in the car. Fetter indicated she first saw the car being driven north up Thayer Road. About ten minutes later she observed the car heading south on Thayer Road. The car pulled into a dirt driveway leading to property owned by a local kennel club and parked for a few

minutes. Just prior to Fetter's going into her home she observed the car back out of the driveway and head north for a second time. Fetter testified she and her husband took care of the property for the kennel club and that she mowed around the driveway earlier in the day and did not observe any tire tracks at that time. However, the next morning she noticed there were tire tracks in the driveway.

Ryan, Cara, and Cara's friend, Michelle Rumer, were at the same time watching the movie at Cara's house. The movie ended at approximately 11 :30 p.m., at which time Michelle left to go home. Ryan stayed about fifteen or twenty minutes after Michelle left. Ryan and Cara walked out of Cara's house and into the driveway.

As he was leaving, Ms. Wireman gave Mr. Young a can of Coke from a refrigerator in the garage. (Tr. 1270).

As Ryan got into the car, Cara heard Ryan remark, "That looks like the White Cutlass that Dick [Joseph] drives." Cara responded, "I doubt that. He wouldn't be out here." Ryan said, "I'm pretty sure that was him."

Ryan was wearing a baseball hat turned backwards on his head that night. Cara saw Ryan back out onto Thayer Road into a position that would permit him to drive north on Thayer. Just as Ryan backed onto the roadway, she saw the dome light in his car illuminate[1] and heard a voice when the dome light came on. Cara also saw Ryan's head turn toward the passenger side door.

---

[1] Rick Young testified that the dome light comes on when either car door is opened. (Tr. 1360).

When Mr. Young backed the car out into the right lane of Thayer road, the driver side of his car was closest to Ms. Wireman's house and the passenger side of the car was closest to the field opposite her house. (Tr. 1274-1275).

> Cara went back into the house and watched television for about fifteen minutes. She decided to go to bed, so she went to shut the front door and saw the tail end of a white car drive by slowly heading south on Thayer Road. She saw the taillights on the car and heard the brakes squeak. The subject car repeatedly turned around after passing Cara's residence and passed in front of her house approximately ten to twelve times. Cara testified the car matched the description of the car belonging to Bill Forest, a friend of [Joseph].[2] Cara testified [Joseph] and Jose Bulerin, [Joseph's] friend and roommate, often borrowed Forest's car. Cara became upset and called Michelle concerning the car that had passed in front of her house. At about 12:35 a.m., Cara called the residence shared by [Joseph] and Bulerin. She spoke with [Joseph's] cousin, April Joseph, who testified neither [Joseph] nor Bulerin was home to answer the call. Cara again called Michelle and talked for a while before calling [Joseph's] residence a second time at 1:00 a.m. [Joseph] and Bulerin still had not returned home.
>
> Cara went to sleep and was awakened by a phone call from Ryan's mother, Sharon Young, at approximately 4:00 a.m. that morning. At about that time, Ryan's father, Rick Young, awoke and discovered that neither his son nor the car Ryan had been driving was home. The Youngs drove down Thayer Road toward Cara's house in search of their son. They found the 1981 Oldsmobile Cutlass Ryan had been driving

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[2] Ms. Wireman knew Mr. Forest's car as she had ridden in it before. (Tr. 1280).

> abandoned just north of the bridge on Thayer Road. Rick entered the car and nothing apparently was out of place. The keys were still in the ignition and the car was still in gear.

Rick Young testified that his son was not in the habit of leaving the car in gear. (Tr. 1363). He also noticed that the "passenger door wasn't shut all the way." (Tr. 1359).

> There were no indications of a robbery, as Ryan's wallet and money were, respectively, left on the seat and console tray of the car.

Rick Young testified that he found a full, unopened Coke can on the seat. (Tr. 1364-1365).

> A wet spot and char marks were found on the passenger seat of the car. The seat had not been wet or dirty the day before.
>
> Inspector William Dailey took a material sample of a burnt log located across the road opposite from Cara's house on the morning of June 27, 1990. The inspector observed that the vegetation there was trampled down so that it led him to believe that someone may have been sitting in that area. The vegetation still had its color and the breaks in the leaves appeared to be fresh. He also took a sample of the blackened stain area on the front seat of Ryan's car for purposes of comparison with the burned log. Chemical analysis performed later revealed that the samples were consistent with one another.
>
> The sheriff's department was notified and a search began. After talking with Cara, Deputy Gene King of the Allen County Sheriffs Office proceeded to [Joseph's] residence to question him concerning Ryan's disappearance. King arrived at [Joseph's] residence at approximately 5:10 a.m. on the morning Ryan was discovered missing and observed a white

> Cutlass in the driveway. King testified that the hood and radiator of the car were warm to the touch. There was also a dirty hand print on the trunk lid of the vehicle.

Deputy King testified that he immediately advised Mr. Joseph of his rights and asked him if he had been on Thayer Road the previous evening. (Tr. 1395). Mr. Joseph told the Deputy he had not been on Thayer Road. (Tr. 1395). Although Mr. Joseph said that he knew Ryan Young, he also said that he had not seen him for about three weeks. (Tr. 1395-1396). Deputy King also testified that he noticed a brown leather holster that would hold a .38 or .357 revolver lying on the rear floor board behind the driver's seat. (Tr.1397-1398). Mr. Forest testified that he did not own a holster or keep one in his car. (Tr. 1636).

> King spoke with [Joseph] and Bulerin. [Joseph] was hesitant to respond to questioning, as he persistently stared at the ground and his answers were invariably inaudible. The deputy testified that in spite of the early morning hour, [Joseph] did not appear to have been asleep. The deputy also noticed fresh blisters on [Joseph's] right hand.
>
> [Joseph] was questioned both later that morning and about a week afterwards by law enforcement officers. [Joseph] disclaimed any knowledge of Ryan's disappearance. [Joseph] told the sheriff's detectives that on the day of the disappearance he reported to work at Frank's Car Wash. He then left with Forest to go to work at Indian Lake in Logan County. Forest testified that they had been building a deck in order to install a hot tub adjacent to a house. [Joseph], Bulerin, and Forest were using Visqueen to cover up the deck to protect against the rain.
>
> [Joseph] told detectives that the trio worked until about 6:30 p.m. before starting back to Lima to attend

> karate class. According to Forest, the karate class was taught by Bulerin with [Joseph] helping out as a co-instructor. [Joseph] and Bulerin then left karate class in Forest's car, the white Cutlass. Forest testified he left class with his girlfriend and did not see either [Joseph] or Bulerin again that night. [Joseph] and Bulerin went home, got cleaned up, and then left to get something to eat. [Joseph] stated that, afterwards, the pair drove around in Forest's car for several hours before returning home and going to bed at approximately 2:30 a.m. [Joseph] also stated that the brakes on Forest's car did squeak on that night.

Besides Deputy Gene King's interview of Mr. Joseph and Mr. Bulerin, there were two other interviews on 27 June 1990. Sergeant Jack Cheney testified that Mr. Joseph, his father, and a woman came to the station at 6:48 a.m. (Tr. 1412). According to Sergeant Cheney, he told Mr. Joseph that he was not under arrest and could leave at any time. (Tr. 1413). He advised Mr. Joseph of his rights, and Mr. Joseph signed a written waiver and proceeded to speak with Sergeant Cheney without an attorney or his father present. (Tr. 1413). Detective Ketchum testified that he interviewed Mr. Joseph at approximately 10:30 or 10:45 a.m. at the station. (Tr. 1429-1430). Detective Ketchum did not admonish Mr. Joseph of his rights at that time. (Tr. 1429).

After his arrest on 4 July 1990, Mr. Joseph gave another statement to the police. He denied being jealous of Mr. Young and denied ever having followed him and Ms. Wireman. (Tr. 1687-1688). Inspector Van Horn testified that, before Mr. Joseph spoke with him, he advised Mr. Joseph of his rights and Mr. Joseph signed a waiver form. (Tr. 1682-1683). Then, on 6 July 1990, while in custody, Mr. Joseph was interviewed again by Inspector Dailey and Investigator Anthony DePalma. At the 29 October 1990 suppression hearing, Investigator DePalma testified that, for two and a half hours, they attempted to convince Mr. Joseph to speak

with them. (Ex. DC at 69). The officers did not read Miranda warnings to Mr. Joseph during this time. (Ex. DC at 69). According to Investigator DePalma, Mr. Joseph repeatedly told them, "I've already told you everything I know about the crime." (Ex. DC at 70). On several occasions, Mr. Joseph looked remorseful and "ready to tear up." (Ex. DC at 72).

> Although Forest's car had new tires on it, Bulerin took Forest's car and changed the tires the day following Ryan's disappearance. Three of the tires that had been on Forest's car the night of Ryan's abduction were recovered by Detective Sergeant James Ketchum, who testified the tread pattern on one of the tires was similar to the tire prints found in the driveway to the kennel club located on Thayer Road.
>
> Forest had kept a knife clipped to the sun visor in his car that was identical to another knife owned by a friend of his. The knife of Forest's friend was subsequently turned over to Lieutenant Van Horn by Forest for the investigation. Forest's knife had been in Forest's automobile on June 26, 1990; however, it had not been seen since. Forest testified that [Joseph] and Bulerin had used his car, had access to it, and traveled in it together frequently. [Joseph] and Bulerin also kept articles in his car, and he had observed a piece of material described as plastic, vinyl, or Visqueen and a shovel in his trunk. Forest had observed the same shovel before at [Joseph's] house.

Mr. Forest testified that the shovel was owned by Mr. Joseph and Mr. Bulerin. (Tr. 1631).

> Forest also testified that he had watched a lot of movies with [Joseph] and Bulerin, many of which dealt with the martial arts. He also knew that [Joseph] had a black mask.

> Monte Stinebuck worked at Frank's Auto Wash with [Joseph], Forest, and Bulerin. He testified that he saw [Joseph] and Bulerin on Thursday, June 28, 1990, and it was rainy that day. A discussion ensued regarding hauling some trash from the car wash and taking it to Joseph's Sand and Gravel Pit. They had never taken trash there before and the truck was loaded a quarter full.

Mary Joseph, Mr. Joseph's grandmother, testified that Mr. Bulerin called her to arrange to drop off the garbage. (Tr. 1597).

> Throughout the week following Ryan's disappearance, an extensive search was conducted. On July 4, 1990, the Allen County Sheriff's Department acted upon the information provided by Stinebuck and instituted a search at Joseph's Sand and Gravel Pit located in Auglaize County and owned by Joseph's grandparents. Mary Joseph, [Joseph's] grandmother, testified that she owned the sand and gravel pit and that [Joseph] was familiar with it, as he had spent a lot of time there growing up.
>
> Ryan's body was discovered in a shallow grave. The body was wrapped in Visqueen, the jagged edge of which was matched positively with Visqueen recovered from the job site at Indian Lake where [Joseph] had been working. Under the body, a black ninja mask was recovered. An autopsy revealed that Ryan had superficial lacerations in the area of the throat. Further, Ryan had been stabbed two times in the back - one to the right flank and one at the base of the skull.[3]

Id. at 450-454.

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[3] Either wound by itself would have been fatal. (Tr.1725-1727).

The body was located approximately 300 yards from where the barrels and appliances from the car wash were found. (Tr. 1458). A "folding type army shovel" was found down a hill from the barrels. (Tr. 1461). A forensic scientist also testified that the two pieces of plastic have the "same chemical property." (Tr. 1768). Mr. Forest testified that Mr. Joseph and Mr. Bulerin owned black martial arts uniforms and at least one black mask. (Tr. 1635). Mr. Forest stated that the black mask found under the body was "very similar" to one owned by his friends that he saw at Mr. Joseph's house. (Tr. 1635). Dr. Martin testified that there were some small, superficial cuts on the neck that could have been made pre- or post-mortem. (Tr. 1715, 1749). In addition, there were several scratches on the right arm that could have been caused by any number of things before or after death. (Tr. 1738). According to Dr. Martin, there was no mutilation of the body, no broken fingernails, no evidence of the use of cords or restraints, and no evidence of bruises, with the exception of the bruising around the stab wounds. (Tr. 1742, 1745-1746).

After Mr. Joseph's arrest, Detective Ketchum searched Mr. Joseph's purple Pontiac LeMans and removed the trunk mat. (Tr. 1466). A hair found on the mat "was consistent in color and texture" with Mr. Young's hair. (Tr. 1779-1782).

Bill Forest testified at trial on 18 January 1991. He stated that at 7:30 a.m. on 27 June 1990, the morning after Mr. Young's disappearance, Mr. Bulerin arrived to drive him to work as usual. According to Mr. Forest, although Mr. Bulerin usually was in a good mood in the morning, he snapped at Mr. Forest in a mean way that morning. (Tr. 1623). Mr. Forest also testified that Mr. Joseph appeared at his home that morning, which was unusual, "kind of looked mad[,] and walked right past [Mr. Forest] real fast" to speak with Mr. Bulerin. (Tr. 1623-1624). Mr. Forest was arrested for the murder of Ryan Young on 4 July 1990, along with Mr. Joseph and Mr. Bulerin. (Tr. 1837-1838).

Four knives are involved in this case. The first is the black knife Mr. Forest kept in his car, which disappeared from the car and was never found. Mr. Forest did not himself notice it was missing. (Tr. 1627). The second knife is the duplicate owned by Mr. Forest's friend. This camouflage knife was identical to Mr. Forest's black knife, except for its color. (Tr. 1626). This second knife was admitted into evidence. Dr. Amy Martin of the Hamilton County Coroner's Office testified that this knife was consistent with the knife that caused the stab wounds. (Tr. 1729). The third knife was found by law enforcement officers in a black sheath in Mr. Forest's car and was admitted into evidence. The sheath, but not the knife, tested positive for the presence of human blood. (Tr. 1772-1173). The fourth knife was found during a search of Mr. Joseph's residence in a black bag. The black bag and its contents, including the knife, were admitted into evidence.

2. Pretrial Proceedings

On 12 July 1990, an Allen County Grand Jury indicted Richard Joseph and Jose Bulerin on one count of aggravated murder. (Ex. A). Specifically, the indictment alleged that the two men "did jointly purposely cause the death of another, to wit: Ryan R. Young, while committing or while fleeing immediately after committing kidnapping." (Ex. A). The following "specification" was included: "the offense was committed while the offenders were committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, and the offenders were the principal offenders in the commission of the kidnapping." (Ex. A). The language of this specification and the understanding (or misunderstanding) of it by the prosecutors, defense counsel, and trial judge is relevant to several of Mr. Joseph's federal habeas claims. This language differs from that of O.R.C. 2929.04(A)(7), which includes the phrase "principal offenders in the commission of the aggravated murder," rather than "of the kidnapping."

Attorneys Gregory Novak and Mark Weller were appointed as defense counsel. (Ex. P, Q, W, AB). Mr. Joseph pled not guilty to the charge and specification. Judge Michael Rumer, who was originally assigned the case, recused himself on 27 August 1990. (Ex. N). Judge Randall Basinger was assigned to hear the case.

Defense counsel filed numerous pretrial motions. On 19 July 1990, the defense moved for a bill of particulars and for discovery, including any evidence favorable to Mr. Joseph. (Ex. Y, AA). On 15 August 1990, defense counsel filed motions for change of venue (because of extensive media coverage of the case) and for funds for an investigator, psychologist, mitigation team, and experts. (Ex. U, V). The next day, Judge Basinger granted the motion for funds and appropriated $7,500. (Ex. T). On 31 August 1990, the State responded to Mr. Joseph's discovery demand by producing several statements and documents and by permitting the defense to inspect objects and reports.[4] (Ex. DB). Under the category "disclosure of evidence favorable to defendant," County Prosecutor David Bowers typed "None." (Ex. DB). On 10 September 1990, Judge Basinger provided an additional $5,000 for investigator expenses. (Ex. L).

Multiple relevant defense motions were filed on 17 September 1990: motions to exclude a videotape of the scene where the body was found, for disclosure of impeaching information (including any immunity grants), for mitigation discovery (including any favorable and exculpatory evidence), for Mr. Joseph to be present at "all stages of the legal proceedings" against him, to prohibit any questioning of potential jurors regarding their attitudes toward the death penalty before the guilt/innocence phase of the trial, to

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[4] The prosecution supplemented this response with additional statements, documents, reports, and witness information on 14 September 1990, 2 October 1990, 11 October 1990, and 29 October 1990. (Ex. G, BC, BJ, BN, CB, CH, CI, CJ, CO).

require the jury to articulate the method by which they weigh the aggravating circumstance against the mitigating factors, to exclude evidence of Mr. Young's character, to exclude the autopsy and crime scene photographs of Mr. Young, and to prohibit references to the jury's penalty decision as a "recommendation." (Ex. G, BC, BJ, BN, CB, CH, CI, CJ, CO).

Judge Basinger held a pretrial hearing on 28 September 1990 and issued a written order regarding the defense motions on 10 October 1990. (Ex. AI. EL at A-18). Although Judge Basinger denied the motion for disclosure of impeaching information, he granted the motion for mitigation discovery with respect to information discoverable under Rule 16 of the Ohio Rules of Criminal Procedure. (Ex. EL at A-19 and A-20). During the hearing, Judge Basinger stated, "the Court expects full compliance under 16(B)(1)(f) which is evidence favorable to the defendant. If it is arguably favorable to the defendant the Court expects a disclosure of that information." (Ex. AI at 12). County Prosecutor Bowers responded that he understood this requirement. (Ex. AI at 12). Defense Counsel Novak then stated, "it is our understanding that one of the witnesses was granted some type of consideration or immunity, namely, William Forest, and to date we haven't received anything." (Ex. AI at 13). Assistant County Prosecutor Dan Berry replied, "I think it's incumbent upon the State to provide that information. We fully intend to do that." (Ex. AI at 13). Judge Basinger reiterated that Rule 16 "must be complied with." (Ex. AI at 13).

The judge granted the motion for the defendant to be present at all proceedings, (Ex. AI at 24-25, EL at A-20). The judge also granted the motion to prohibit references to the jury's penalty decision as a "recommendation," but only as to the prosecution and defense counsel. (Ex. AI at 48-51, EL at A-22 to A-23). Judge Basinger denied the motions to prohibit voir dire questioning concerning juror views on the death

penalty, to require the jury to articulate its weighing method, to exclude the videotape of the crime scene or photographs of the body, and to prohibit evidence of Mr. Young's character (subject to appropriate objections during trial). (Ex. EL at A-21 to A-23). The judge

scheduled an evidentiary hearing on the venue change motion for 2 January 1991. (Ex. EL at A-24). Judge Basinger explained that he would try to seat a jury before deciding whether a change of venue was appropriate. (Ex. AI at 64).

Defense counsel filed a motion to suppress on 23 October 1990, seeking suppression of Mr. Joseph's five oral statements to the police and exclusion of the knives, guns, and other weapons taken from Mr. Forest's car (one knife) and Mr. Joseph's residence (nearly 80 weapons) and received from Mr. Forest's friend (one knife). A suppression hearing was held on 29 October 1990, at which eight witnesses testified and arguments were heard. (Ex. DC). Judge Basinger denied the motion to suppress with respect to the three 27 June 1990 Joseph statements and his 4 July 1990 statement, but granted the motion with respect to Joseph's 6 July 1990 statement. (Ex. EL at A-26 to A-30).

On 5 December 1990, the prosecution provided a bill of particulars. (Ex. CU). The State expressed its theory of the crime as follows: Mr. Joseph entered Mr. Young's car, forced Mr. Young to drive north and to enter Mr. Forest's car, and later inflicted the lethal knife wounds and transported Mr. Young's body to the gravel pit. (Ex. CU).

On 31 December 1990, Mr. Joseph filed a notice of withdrawal of his demand for trial by jury. (Ex. AK at 16). He filed a jury trial waiver on 2 January 1991. (Ex. AK at 17). Two days later, a brief hearing was held, during which Defense Counsel Novak explained that the prosecution had offered a plea agreement that he and Defense Counsel Weller had recommended Mr. Joseph accept but which Mr. Joseph rejected. (Ex. DO). According to Defense Counsel Novak,

"the nuts and bolts of the plea bargain negotiation was that the prosecution would recommend a non-death penalty for a plea to the indictment and that the Court had accepted that negotiation." (Ex. DO at 3). In open court, Mr. Joseph personally stated that he was rejecting the proposal against defense counsel's advice. (Ex. DO at 3-4).

3. Voir Dire

The trial commenced on 7 January 1991. Rather than proceed with a trial by three-judge panel, Mr. Joseph withdrew his jury trial waiver. (Tr. 1-3). Voir dire then began. In his introductory remarks to the venire, Judge Basinger referred to the jury's decision in the second stage of the trial as a "recommendation." (Tr. 16-17).

For the purposes of this petition, the relevant voir dire is of the twelve actual jurors and three prospective jurors who Petitioner argues should have been stricken for cause. Judge Basinger asked general questions to groups of prospective jurors, but reserved questions regarding media exposure and the death penalty for individual voir dire.

In response to Judge Basinger's initial individual voir dire questions, each of the twelve eventual jurors affirmed that he or she could set aside any prior information concerning the case and decide the case solely on the evidence, could follow the judge's instructions, could be impartial, and had not formed or expressed an opinion as to the guilt or innocence of Mr. Joseph. During the questioning of the prospective jurors, defense counsel frequently noted the awkwardness of discussing the death penalty before the guilt/innocence phase of the trial had begun. Defense Counsel Novak or Defense Counsel Weller usually asked a question similar to the following: "Do you feel kind of funny that we're already talking about guilt [or the punishment or the penalty] when you haven't even heard the first part of the case yet?" (Tr. 373, 297, 403, 601, 808, 839-840, 983-984).

Prospective Juror[5] Janice McIntosh stated that she would try to follow the Judge's instructions and would try to decide the case based on the evidence. (Tr. 250-252). She stated, "Some of the people that I work with did help in the search for Ryan [Young] ... We had yellow ribbons on the poles. So, we were kind of involved in looking for Ryan." (Tr. 252). Her employer hung a yellow ribbon. (Tr. 263-264). She said that she "would try [her] hardest" to be an impartial juror. (Tr. 253). With respect to Mr. Joseph, Ms. Mcintosh only knew that his name was associated with the case. (Tr. 260). During his questioning, County Prosecutor Bowers referred to "a recommendation of the death penalty." (Tr. 259). Judge Basinger overruled defense counsel's objection. (Tr. 259). Ms. Mcintosh had heard that Mr. Young's body had been mutilated with the "male parts" cut off. (Tr. 261-262). She also had heard that devil worshipers and cults were involved in the crime. (Tr. 262). Ms. Mcintosh stated, "I won't say that I can just wipe it away" but "would try once I got in the Courtroom to forget everything else I ever heard." (Tr. 265-266). She concluded by saying that she felt she could be impartial and that she "would not want to do anything to hurt Mr. Joseph just because of something that [she] heard other than in here." (Tr. 267). In order to approach the prospective juror for further questioning, Defense Counsel Novak then proceeded to move the prosecution's table, which prompted a scolding by the Judge. (Tr. 269-271). Judge Basinger denied Defense Counsel Novak's motions to dismiss Ms. Mcintosh for cause. (Tr. 279, 283).

From television, radio, and newspaper reports, Juror Theron Hogan had heard that "a person was murdered. They searched for his body a long time and eventually found it. A lot of people were upset about it." (Tr. 287). Mr. Hogan

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[5] In this section, the use of the term "Juror" indicates that the individual went on to serve on the petit jury. The use of the term "Prospective Juror" indicates that the individual did not go on to serve on the petit jury.

added, "My personal feeling was that I was hoping that they would just find the person, find Ryan Young, and just get it over with because it was kinda bugging me just hearing about it all the time constantly." (Tr. 287-288). During his questioning of Mr. Hogan, County Prosecutor Bowers twice referred to a jury recommendation of death and once to "a verdict requesting ... the Judge, to impose the death penalty." (Tr. 290, 292, 293). There was no objection to these specific references. Mr. Hogan stated that he had expressed his opinion in stronger language that "they should find out whoever did this, however it happened, and that justice would be done." (Tr. 294-296). He said, "I would put all that aside, though ... put everything aside and just decide after hearing all, you know, all the case and stuff." (Tr. 297). When asked how he knew he could do that, Mr. Hogan responded, "Because I know myself." (Tr.297).

When questioning the next prospective juror (who did not sit on the jury), County Prosecutor Bowers referred to a jury recommendation of the death penalty and the jury asking the court to impose the death penalty. (Tr. 309, 312). Judge Basinger instructed the prosecutors not to refer to the penalty decision in this manner. (Tr. 314). The next day, on 8 January 1991, Defense Counsel Novak requested that the Judge ask prospective jurors what they heard about the case and what their opinions were before asking them if they could set the information and opinions aside. (Tr. 322-323). Judge Basinger declined to adopt this suggested procedure.[6] (Tr. 324-325).

Prospective Juror Ladonna First stated that she held an opinion as to the guilt or innocence of Mr. Joseph, but thought that she could set it aside and presume the defendant was innocent. (Tr. 327-328). She said, "At the beginning,

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[6] Aside from this general procedural objection, defense counsel passed for cause on each of the twelve individuals who eventually served on the petit jury.

naturally, I followed very closely the fact that he was missing." (Tr. 335). To friends, she expressed her thought that the "harshest penalty possible" should be meted out to the perpetrator. (Tr. 338). Ms. First stated that she did not know if her prior opinions and conversations would affect her judgment but that they probably would. (Tr.340-341). However, in response to Judge Basinger's questions, she stated that she thought she could be impartial and could follow his instructions. (Tr. 342). Judge Basinger denied defense counsel's motions for removal for cause. (Tr. 343, 353). Defense Counsel Weller reiterated defense counsel's objection to Judge Basinger's voir procedure, arguing that the Judge was inappropriately rehabilitating prospective jurors through his questions. (Tr. 343).

Juror William Harrison stated that he knew something about the case from reading the newspaper, but did not know of any facts showing that Mr. Joseph was guilty. (Tr. 356). He said, "Everyone was highly upset, you know, but that's just a normal thing." (Tr.361). Defense Counsel Novak concluded the questioning of Mr. Harrison by once again noting defense counsel's continuing objection to the Judge's approach to voir dire. (Tr. 363).

Juror Joyce Fisher knew that Mr. Young had disappeared and that his car was found with the car keys in it. (Tr. 366). She also stated, "Everybody was looking for him. They were having prayer vigils. They found him in a quarry. They arrested a couple people." (Tr. 366). However, she had no opinion as to Mr. Joseph's guilt or innocence and knew of no evidence against him. (Tr. 367).

Juror Katherine Valenti had heard that Mr. Young had been at his girlfriend's house and was abducted, "that a lot of people were involved in trying to look for him," and that his body was found about a week later. (Tr.381). She also heard that the body was found in a gravel pit "beat up pretty bad." (Tr. 387). She stated that she had no opinion as to the guilt or

innocence of Mr. Joseph because she only heard hearsay about the case and "[m]ost of the time some of the stories get stretched out and you just can't believe everything." (Tr. 380-382). Ms. Valenti said, "Really it was all over. My sister heard some things where she worked and I heard some things where I worked. Even walking through the mall, you know, I heard people talking." (Tr. 386-387). During his questioning, County Prosecutor Bowers referred to the possible penalties the jury might impose as "recommendations," and the Judge instructed him not to use that term. (Tr. 384-385).

Juror John Heltman stated that, based on what little he had read in the newspaper, he knew that a student at Bath High school had disappeared and been killed. (Tr. 396). He acknowledged that he "really [didn't] know the facts of what happened." (Tr. 396). Although he was not involved, he knew of a car wash for the Ryan Young Fund about which people were talking. (Tr. 396). Mr. Heltman added, "I know there are a lot of people that form judgments prior to knowing what's going on, but I don't, or, I haven't, I guess." (Tr. 397). With respect to Mr. Joseph, Mr. Heltman said, "He could be a person coming on to our lot buying a car this afternoon and I wouldn't have known him until I walked in here yesterday." (Tr. 398). He agreed with Defense Counsel Novak that "this was an extremely high[ly] publicized case." (Tr. 400). When asked if he had heard anybody express their view as to the appropriate penalty for the perpetrator, Mr. Heltman stated, "Not directed towards the defendant, but during the time of right after it occurred, you know, the death penalty was probably nine out of ten peoples choices." (Tr. 401). He also said, "I would not let those things that I have heard - you know, a lot of it was frustration and a lot of it was just hostility. There are people out there who would have capital punishment for jaywalking if you could get away with it." (Tr. 402).

Juror Bradley Fruchey knew that "Ryan Young had been murdered and that he had been missing for awhile and they found him someplace around here" in a gravel pit or shallow grave. (Tr. 410, 418). From conversations with co-workers, he had heard that Mr. Young had been at his girlfriend's house and "never came home and his parents got worried and went out looking for him and they found his car. There was a big search and everything going on around Allen County and stuff." (Tr. 410-411). Mr. Fruchey did not remember anyone discussing Mr. Joseph's guilt or innocence or expressing a view of what should happen to the perpetrators of the crime. (Tr. 411412). His mother was a teacher who knew Mr. Joseph from Bath High School. (Tr.416417). Mr. Fruchey agreed with Defense Counsel Novak that this case received the most publicity and generated the most gossip of any Allen County case in the last ten to fifteen years. (Tr. 417).

In the afternoon of 8 January 2001, Judge Basinger recessed the trial until the next morning because Defense Counsel Novak was ill. (Tr. 433-435). On Wednesday, 9 January 2001, Defense Counsel Weller reported that Defense Counsel Novak's medical condition rendered him unavailable until Monday, 14 January 2001. (Tr.437). Judge Basinger continued the trial until that time. (Tr. 437). He also appointed Michael Dugan as additional defense counsel. (Tr. 437). Before recessing, the Judge made introductory remarks to the second group of prospective jurors, during which he once again referred to a sentencing "recommendation." (Tr. 443).

On 14 January 1991, Defense Counsel Novak returned. (Tr. 448). On defendant's motion, Judge Basinger released Defense Counsel Dugan from the case. (Tr. 451). Defense Counsel Novak also renewed his motion for a change of venue based on extensive pretrial publicity. (Tr. 448). The Judge took the motion under advisement pending further efforts to seat a jury. (Tr. 449). With respect to the outstanding motion to suppress weapons, which had been

converted into a motion in limine, Judge Basinger ruled that "Unless the State of Ohio can show a direct causal connection with a weapon and the allegations charged in this case, the Motion in Limine will be granted and those weapons will not be permitted to be used in this trial." (Tr. 456).

Juror Roger Closson stated that he knew very little about the case, had not discussed the case with others, and had not formed an opinion about the case or the guilt or innocence of Mr. Joseph. (Tr. 547-548, 553). Although he had heard the defendant's name previously, he could not remember it. (Tr. 553).

Juror Jean Welch stated that she did not "know the facts" of the case. (Tr. 572). She had heard that Mr. Young was missing, that there was a search for him, and that a girl was involved. (Tr. 583, 585). She stated, "Other people told me tidbits of what they heard, which I don't put any stock on." (Tr. 583). Ms. Welch agreed that most of what she heard "may be totally outrageous and the furthest thing from the truth." (Tr. 585). She had not heard anyone discuss their opinions as to an appropriate penalty. (Tr. 599- 600). She said that what she heard would not affect her decision. (Tr. 600).

Juror Delphia Kill had heard "a little bit on the radio about [the case]": that Mr. Young was missing and then found dead. (Tr. 642). She "didn't think to [sic] much about it one way or the other." (Tr. 643). She also had heard strangers in the Moose Club discussing the case. (Tr.647). Ms. Kill stated that she "just let it go in one ear and out the other." (Tr. 648).

Juror Mary Gehring had heard that Mr. Young was missing, that there was an extensive hunt for him, and his body was found in a gravel pit about a week later. (Tr. 724). She also had heard the names of the two defendants and "that

they had kidnapped him and murdered him and put him in a stone quarry." (Tr. 724-725). Ms. Gehring said of the case,

> It was highly publicized. It was on the radio. It was on the TV. It was in the newspapers. Yes, I did read about it. Yes, I did hear about it. Yes, I probably made a lot of comments about it. I don't think there was anybody in the hundred miles radius that didn't make some kind of comment about it.

(Tr. 743). Ms. Gehring stated,

> I have never served jury duty. I had no idea, until I was here, what it was all about. I think I can honestly say for the first time that it makes you stop and think. Before I would want to say someone was guilty, I think I would have to have better facts. It's easy to make a rash opinion and a judgment. But, when it comes to somebody's life, well, I never stopped to think about this before, but I think I would want more factual knowledge of this before I could say, hey, you're guilty of something.

(Tr. 726). She confirmed that she could decide the case based on the evidence and not on "scuttlebutt" that she heard "around the community." (Tr. 727).

Juror Vicki Picker had heard by word of mouth that Mr. Young was missing, there was an extensive hunt for him, and his body was found. (Tr.793-794). She also had heard "that a person was apprehended and most of the people felt that the person that was apprehended was guilty of the crime." (Tr. 794). However, Ms. Picker stated that she had not formed an opinion as to Mr. Joseph's guilt or innocence and could reserve judgment until the end of the trial and base her verdict on the evidence. (Tr. 795). She also "heard quite a few people say that" the perpetrator should receive the death penalty. (Tr. 795-796). Ms. Picker said that this would not have any bearing on her decision-making. (Tr. 796).

Juror Mary Roberts stated that she "didn't follow [the case] like most people did." (Tr. 823). She had heard that Mr. Young had been kidnapped and found in a quarry. (Tr. 836). Ms. Roberts had heard about a dozen individuals express very strong opinions regarding the appropriate punishment for the crime that were worse than "hang the guy; fry the guy." (Tr. 836-837, 839). She stated that, although she would remember these comments, they would not lead her to impose the death penalty. (Tr. 837, 839). Ms. Roberts also noted that some people thought that the case should not be tried in Allen County because "there was too much publicity." (Tr. 838).

Prospective Juror Charlene Hites initially stated that she would not consider the youth of the defendant as a possible mitigating factor because she did not "think it makes any difference." (Tr. 984-985). However, when asked if she would follow the Judge's instructions to so consider it, she twice answered that she would. (Tr. 985). Similarly, she originally stated that she would not consider the defendant's background or "the way he was brought up," but then affirmed that she would follow the Judge's instructions with respect to this factor. (Tr. 986-987). Ms. Hites stated that in every case in which a defendant was proven guilty of committing aggravated murder she would give the death penalty. (Tr. 987). In response to Judge Basinger's questioning, however, she stated that she would follow the court's instructions regarding the penalty determination and that life imprisonment could be an appropriate penalty. (Tr. 988-989). She then explicitly stated that she would not always select the death penalty. (Tr. 990). Defense Counsel Novak passed her for dismissal for cause. (Tr. 991).

Judge Basinger then provided introductory remarks and instructions to the second group of prospective jurors,

mentioning the possibility of a sentencing "recommendation." (Tr. 1033).

At the close of voir dire, Defense Counsel Novak renewed his objection to Judge Basinger's voir dire process and to "every single juror of the entire panel." (Tr. 1125, 1127). He argued that the Judge's initial questions locked prospective jurors into early statements of impartiality such that defense counsel "were not really able to have them honestly assess their feelings concerning the venue." (Tr. 1125-1126). Judge Basinger overruled the objection and denied defendant's motion for change of venue in light of the outcome of the voir dire process. (Tr. 1127-1128). Throughout voir dire, the prosecutors and defense counsel described the specification as "the specification of kidnapping" or "the kidnapping specification." (Tr. 892, 922, 929, 930, 970, 974, 1096, 1098).

While discussing trial issues, Judge Basinger permitted the State to introduce only eight of the photographs of the body at the gravel pit. (Tr. 1137-1138). The Judge explained that, for each witness, he would conduct an in-camera review of any Rule 16 statements or grand jury transcripts, searching for exculpatory evidence or a particularized need for the defendant to have access to the grand jury transcripts. (Tr. 1141-1142). Defense Counsel Novak had no objection to this procedure. (Tr. 1142).

As to the three knives the prosecution sought to use at trial, Judge Basinger allowed the knife found in Mr. Forest's car and the knife that was a duplicate of the missing knife that had been in Mr. Forest's car. (Tr. 1151). He reserved ruling on the knife found in Mr. Joseph's residence. (Tr. 1151).

During the peremptory challenge stage, defense counsel struck prospective jurors Ladonna First and Janice Mcintosh, as well as prospective alternate Charlene Hites. (Tr. 1167, 1169, 1174).

4. The Guilt/Innocence Phase of the Trial

On 16 January 1991, Judge Basinger determined that portions of Cara Wireman's statements were arguably exculpatory. (Tr. 1196-1197). He ordered that those statements be disclosed to the defense. (Tr. 1198). The Judge also ruled that the prosecution's videotape of the gravel pit scene could be used at trial. (Tr. 1198).

Opening statements commenced after a lunch recess. Assistant County Prosecutor Berry described the case as "an aggravated murder case with a specification of kidnapping." (Tr. 1201). Judge Basinger twice sustained defense objections to Assistant County Prosecutor Berry's references to Ryan Young's positive attributes. (Tr. 1202, 1210-1211). Assistant County Prosecutor Berry presented the State's theory of the case: that either Mr. Joseph or Mr. Bulerin entered Mr. Young's car and forced him to drive down the road, and that both men took him from the car, killed him "someplace," and dumped the body at the gravel pit. (Tr. 1221). In his opening statement, Defense Counsel Novak twice referred to a "specification of kidnapping." (Tr. 1222, 1224).

Before Cara Wireman testified, the court noted that defense counsel had been given all of her statements that the prosecution possessed. (Tr. 1247-1248). At the close of direct examination, Judge Basinger determined that there had been no showing of particularized need and, therefore, Ms. Wireman's grand jury testimony would not be divulged to defense counsel. (Tr. 1296). After Rose Fetter's testimony, Judge Basinger clarified his approach to in-camera review of witness statements and grand jury transcripts:

> I will be making an in-camera inspection upon the conclusion of the direct examination. I would indicate that I am reviewing those as we go and have reviewed some of those previously. The rule calls for a review while counsel is present. I don't know how strict the

> Court wants to be about that, but I am reviewing them as we go and have reviewed grand jury transcripts.

(Tr. 1321). There was no objection to this declaration. Later in the discussion, Defense Counsel Weller indirectly noted that the defense had both a psychologist and a mitigation specialist from Toledo. (Tr. 1344). Judge Basinger also ruled that the knife found in the bag in Mr. Joseph's residence was admissible. (Tr. 1350).

During a chambers conference at which Mr. Joseph was not present, Defense Counsel Novak left to use the washroom. (Tr. 1407). Defense Counsel Weller remained and continued to participate. (Tr. 1408).[7]

Detective James Ketchum testified later in the day. Defense counsel objected to Detective Ketchum giving his lay opinion as to the similarity between the treads of the tires on Mr. Forest's car and the tire tracks in the photographs taken from Thayer Road. (Tr. 1444-1446). Judge Basinger overruled the objection, stating, "This is an area for cross examination .... If he can say he made a visual observation and could tell there were similarities, well, I'm going to permit it." (Tr. 1446). Although Detective Ketchum did not testify that the tire tracks in the photographs were made by the tires on Mr. Forest's vehicle, he did testify that "Each company makes tires and they put a different tread pattern in them. These tires have a definite distinct pattern, along with the photographs which I took have the same distinct type pattern." (Tr. 1448-1449).

During April Joseph's testimony, Assistant County Prosecutor Berry asked her to describe a ninja mask purchased by Mr. Joseph years ago. (Tr. 1527). The following interaction took place:

Q: Did it have holes to breathe, or did it have -

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[7] This detail relates to Mr. Joseph's fifteenth federal ground for relief, which concerns his absence from some trial proceedings.

A: It had eye holes.

Q: Can you describe the eye hole for me?

A: I believe it was just one complete hole.

(Tr. 1528).

In an afternoon chambers conference, a few potentially significant but unrelated events occurred. County Prosecutor Bowers requested an aider and abetter instruction, and, referring to Mr. Joseph and Mr. Bulerin, stated, "we can't prove which one of them did it." (Tr. 1582). While discussing the mitigation phase, Defense Counsel Weller mentioned that defense counsel "were prepared to bring in twenty-five or thirty people" as mitigation witnesses. (Tr. 1591).

On the morning of 18 January 1991, William Forest testified for the government. Following direct examination, Judge Basinger told counsel that he found "some very minor discrepancies" between Mr. Forest's testimony and the 42-page transcript of a statement he gave to the Sheriff's Department on 7 July 1990. (Tr. 1637). Defense counsel were given about 50 minutes to review the statement before beginning cross examination, but were not permitted to review the grand jury transcripts. (Tr. 1637, 1647). With respect to the autopsy photographs, the Judge decided to allow the prosecution to pick any nine for use at trial. (Tr. 1645).

In return for his testimony against Mr. Joseph and Mr. Bulerin, the State gave Mr. Forest immunity from prosecution. This fact did not come to light until defense counsel's cross examination of Mr. Forest. (Tr. 1647-1648). At sidebar, Assistant County Prosecutor Berry denied that any immunity had been granted, while County Prosecutor Bowers indicated that "conditional immunity" had been granted. (Tr. 1649). According to County Prosecutor Bowers, he told Mr. Forest's attorneys that if Mr. Forest gave a

complete and truthful statement, the State would release him from jail and dismiss the pending criminal charges. (Tr. 1650). Defense counsel stated that, although they knew of Mr. Forest's arrest and release, they were unaware of this agreement between Mr. Forest and the prosecution. (Tr. 1651-1652).

Further, later that day, in chambers, Judge Basinger confronted County Prosecutor Bowers with the fact that an immunity hearing had been held several months earlier before another judge and that County Prosecutor Bowers himself had signed immunity documents for Mr. Forest. (Tr. 1695-1697). In response to County Prosecutor Bowers' statement that he had forgotten the immunity proceedings for Mr. Forest, the Judge commented, "Well, that's difficult for this Court to believe." (Tr. 1697-1699). In order to cure the prosecution's failure to turn over this exculpatory information to the defense, Judge Basinger ordered the State to produce its entire file on Mr. Forest to the defense, permitted the defense to recall Mr. Forest for further cross examination, made Mr. Forest available for a deposition, and disclosed the transcripts of the immunity hearing and Mr. Forest's grand jury testimony to the defense. (Tr. 1750-1756).

Defense counsel deposed Mr. Forest on 21 January 1991 but declined to recall him to the stand. During the deposition, Mr. Forest testified that he had received immunity from prosecution and made two further statements to law enforcement after the grant of immunity: a "dry run" statement on 6 July 1990 and a taped statement on 7 July 1990. (Tr. 1843-1845). When asked by the Judge why he did not intend to recall Mr. Forest for additional cross examination, Defense Counsel Novak stated, "We don't want to highlight his testimony because of the long break in time." (Tr. 1967). Defense Counsel Novak added, "It's just a strategy move. The jury is fresh now and their minds are open. It's not for the appeal. It's for strategy of the trial.

That's why we're doing it." (Tr. 1967). The next morning, on 22 January 1991, defense counsel formally waived the right to recall Mr. Forest in open court. (Tr. 1971).

During the State's initial closing argument, Assistant County Prosecutor Berry admitted, "the State of Ohio can't prove to you exactly when the death occurred." (Tr. 1976-1977). He also stated,

> Another thing the State of Ohio doesn't know and can't tell you, and it doesn't make any difference as long as you find the two people, Jose Bulerin and Richard E. Joseph, jointly committed these crimes, or this crime, the law is very clear in Ohio that if one person is an aider and abetter, no matter what part he has in it, if he plays a part in the commission of that crime then he's as guilty as the other guy. The State of Ohio can't tell you. I wish I could. I wish I could tell you exactly what happened. I don't know who struck the death blow. But, I believe the evidence is very clear that it was one of the two that's charged here. If you find one of them did it, or the other one did it, they're both just as guilty as if each of them had their hands around the hilt of that knife when it was stuck in Ryan Young.

(Tr. 1976). Assistant County Prosecutor Berry later reiterated, "it doesn't make any difference who did what; who did the cutting." (Tr. 2007). He also pointed to the "unrefuted testimony" that Mr. Bulerin and Mr. Joseph, while working at the lake on 26 June 1990, went to the gravel pit. (Tr. 1981).

Throughout the closing argument, Judge Basinger sustained eight defense objections to Assistant County Prosecutor Berry's use of the words "I think" and "I believe." (Tr. 1980, 005-2009, 012). After the fourth objection, Assistant County Prosecutor Berry apologized for saying "I" and the Judge instructed the jury "to disregard any statements

of the prosecutor as to what he believes." (Tr. 2007). After the sixth objection, Assistant County Prosecutor Berry stated, "I apologize. I am not intentionally doing that. I will do my best to stop saying that." (Tr. 2008). Following the eighth objection, the Judge instructed Assistant County Prosecutor Berry not to continue using "I." (Tr. 2012).

In his closing argument, Defense Counsel Novak presented his view that the State's circumstantial case rested upon numerous inferences and assumptions. He continually cautioned the jury not to pile inference upon inference in reaching its verdict. At the very end of his closing, Defense Counsel Novak then switched his focus to a manslaughter argument:

> You may deliberate and find that it caused a germ, a growth, uncontrollable jealousy with no prior calculation and design at all ... You may find that [Mr. Joseph] was talking to Ryan that night about Cara ... Maybe they talked about lovemaking. Maybe he just grabbed that knife, in a fit of passion, right from the sun visor and pulled him out of the car and stabbed him. Fit of rage. That's manslaughter ... This jealousy kept growing and growing ... It had to be very fast; very quick. In a fit of anger. Uncontrollable. He couldn't eat or sleep. He is very, very, very young.

(Tr. 2033-2034).

County Prosecutor Bowers then made a rebuttal argument. He pointed to "the uncontroverted evidence from this witness stand." (Tr. 2039). He continued, "You heard each and every thing that would go to show kidnapping. Uncontroverted. Uncontroverted from that witness stand," (Tr. 2040). Defense counsel did not object to these comments. County Prosecutor Bowers also asserted, "We don't have to show that this defendant was the one who administered the fatal blows. He was with him. We don't know which one did it. We don't have to prove that." (Tr.

2042). With respect to Mr. Forest, County Prosecutor Bowers argued, "there's no evidence from that witness stand that in any way implicated Bill Forest. His story checks out a hundred percent. ... He came in here and told the truth. How did Bill Forest impress you folks? What's his credibility?" (Tr. 2046). County Prosecutor Bowers concluded by saying, "Circumstantial evidence proves that this defendant is guilty of aggravated murder with a specification of kidnapping." (Tr. 2049).

Following closing arguments, Judge Basinger instructed the jury as to the relevant law. He noted that the defendant has a constitutional right not to testify and that the fact that the defendant did not testify could not be considered for any purpose. (Tr. 2057). While discussing the offense of aggravated murder, the Judge informed the jury "if you find beyond a reasonable doubt that Richard E. Joseph purposely aided, helped, or assisted Jose Bulerin in the commission of aggravated murder the defendant is to be regarded as if he was the principal offender, and is just as guilty as if he personally performed every act constituting the offense." (Tr.2061). When instructing the jury on the specification, Judge Basinger read the specification as it was written in the indictment, with the phrase "the principal offenders in the commission of the kidnapping." (Tr. 2066-2067). In the context of the specification, Judge Basinger stated, "A principal offender or offenders is defined as that person or persons primarily responsible for the alleged illegal conduct involved." (Tr. 2067). The judge later read the verdict form, which included the specification language "principal offender in the commission of the aggravated murder." (Tr. 2074-2075). Defense counsel offered no objections to the jury instructions as read by the judge. (Tr. 2078).

On 22 January 1991, the jury returned verdicts of guilty on the charge of aggravated murder and on the specification. (Tr. 2090-2091; Ex. EN at A-3, A-4). The specification verdict form signed by the jurors included the language

"principal offender in the commission of the Aggravated Murder." (Ex. EN at A-4). A written Judgment Entry of Conviction of Richard Joseph was filed on 30 January 1991. (Ex. B).

5. The Penalty Phase of the Trial

A capital sentencing hearing[8] was held on 28, 29, and 30 January 1991. During the hearing, Judge Basinger and the jury heard argument from the prosecution, arguments and testimony from the defense, and an unsworn statement from Mr. Joseph.

In a pre-hearing chambers conference, Defense Counsel Novak and the judge expressed their understanding of the aggravating circumstance as being the kidnapping. (Mitigation Tr. 9-10). In his initial mitigation phase instructions to the jury, Judge Basinger read the specification with the "principal offenders in the commission of the kidnapping" language. (Mitigation Tr. 25-26).

Defense Counsel Weller's opening statement included three references to the kidnapping as the aggravating circumstance. (Mitigation Tr. 30-31). Defense Counsel Weller stated, "[t]he kidnapping, and the kidnapping alone, is the aggravating circumstance." (Mitigation Tr. 31). Defense Counsel Weller argued that the following were mitigating factors: Mr. Joseph's age of 19, his lack of any criminal or juvenile record, his character, history, and background, and his "potential future worth." (Mitigation Tr. 31).

County Prosecutor Bowers began his mitigation hearing opening statement by stating, "at this phase of the proceeding the State of Ohio has no obligation to present any evidence or go forward. The burden is on the defense." (Mitigation Tr. 32). Judge Basinger sustained Defense Counsel Novak's

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[8] Capital sentencing hearings also are referred to as mitigation hearings or penalty hearings.

objection and informed the jury that "[t]he burden of going forward is on the defense only." (Mitigation Tr. 32).

Beverly Yore, Mr. Joseph's mother, testified that her husband (Mr. Joseph's father) twice beat her in front of Mr. Joseph, once when he was three months old and once when he was two and a half or three years old. (Mitigation Tr. 39). She stated that Mr. Joseph's stepfather was distant with Mr. Joseph and that "his father was too busy with his job" to be close with him. (Mitigation Tr. 43, 45). Ms. Yore stated that Mr. Joseph had a learning disability, "was never into trouble before," and never exhibited aggressive behavior growing up. (Mitigation Tr. 55, 57, 58). She testified that, on one occasion, Mr. Joseph was very sick because of using "uppers and marijuana," but Mr. Bulerin refused to send him home to her. (Mitigation Tr. 51-52). According to Ms. Yore, when she confiscated a gun that Mr. Bulerin had given Mr. Joseph, Mr. Bulerin "threatened to break into [her] home and take something, or kill [her] dogs." (Mitigation Tr. 61). On cross examination, she admitted that she kicked Mr. Joseph out of her house and changed the locks. (Mitigation Tr. 64-65). With respect to incidents about which Ms. Yore testified, Assistant County Prosecutor Berry three times asked her "what does that have to do with kidnapping?" (Mitigation Tr. 66-67).

Ralph Joseph, Mr. Joseph's father, testified next. He testified that Mr. Joseph used to work on trucks and equipment and had been a very hard worker. (Mitigation Tr. 77). When his son was about two or three years old, Ralph Joseph served a year in prison for drug trafficking. (Mitigation Tr. 77). According to Ralph Joseph, his son did not know about the incarceration until age sixteen. (Mitigation Tr. 78). He stated, "I don't think it bothered him any." (Mitigation Tr. 77). Ralph Joseph testified that he was not sure that Mr. Joseph could remember the "physical altercations" between him and his wife. (Mitigation Tr. 86-87). He stated that Mr. Joseph had always been quiet and

non-talkative. (Mitigation Tr. 87). He concluded his testimony by agreeing that Mr. Bulerin had "great influence" over his son and that Mr. Joseph was "relatively immature," (Mitigation Tr. 94).

Lucretta Joseph, Mr. Joseph's stepmother, testified that, having watched Mr. Joseph for ten years, "[h]e never showed any aggressive actions that he would ever hurt anyone or anything." (Mitigation Tr. 106). She stated, "I never saw anything that would ever lead me to believe that he could do anything like this." (Mitigation Tr. 106).

Becky Bulerin, Mr. Bulerin's ex-wife, testified that Mr. Joseph did not have "that kind of aggression in him" to commit murder but that Mr. Bulerin did. (Mitigation Tr. 116).

Thomas Schaaf, the Assistant Elementary Principal and Special Education Director for the Bath school district, stated that Mr. Joseph had been placed in a learning disabilities program in third grade and remained there until his graduation from high school. (Mitigation Tr. 120). On cross examination, Mr. Schaaf testified that Mr. Joseph's class rank had been 124 out of 178 and most recent IQ full scale score was 104. (Mitigation Tr. 128).

Mr. Joseph's high school principal, Warner Kugler, testified that Mr. Joseph had no disciplinary problems and had "pretty good" attendance. (Mitigation Tr. 134).

Melanie Hankener, Mr. Joseph's special education teacher during his junior and senior years of high school, characterized Mr. Joseph as quiet and cooperative. (Mitigation Tr. 148).

Investigator Anthony DePalma testified that, when he and Inspector Dailey questioned Mr. Joseph, he was polite and "very cold." (Mitigation Tr. 154). According to Investigator DePalma, Mr. Joseph only showed emotion when they spoke of Mr. Young's parents. (Mitigation Tr. 155). At one point

during the interview, Mr. Joseph had tears in his eyes and said, "Tell them I'm sorry." (Mitigation Tr. 155). Investigator DePalma testified that he had never interviewed anyone who was less responsive than Mr. Joseph. (Mitigation Tr. 157). He confirmed that Mr. Joseph had no criminal or juvenile record. (Mitigation Tr. 160).

Gary Ericson, a mitigation specialist for the defense, testified that Mr. Joseph did not have any adult criminal or juvenile convictions. (Mitigation Tr. 169). He also stated that Mr. Joseph had not had any "critical incidents" at the Allen County Correction Center, where he was detained. (Mitigation Tr. 169). According to Mr. Ericson, Mr. Joseph had only eleven absences during four years of high school, was nineteen years old, and was relatively immature with respect to his responsibility level. (Mitigation Tr. 174, 177, 179). He opined that Mr. Joseph had some potential for rehabilitation and was unlikely to commit future offenses. (Mitigation Tr. 180-1812).

Following Mr. Ericson's testimony, an in-chambers conference for counsel and the Judge was held without Mr. Joseph. (Mitigation Tr. 187). In regards to Mr. Joseph's decision to give an unsworn statement, Defense Counsel Novak stated, "Oh I wouldn't doubt if he gets up there and doesn't say anything. Off the record, please." (Mitigation Tr. 189).

Dr. Wayne Graves, a psychologist, conducted a psychological evaluation of Mr. Joseph. (Mitigation Tr. 204-205). Dr. Graves reviewed Mr. Joseph's records and had eleven or twelve hours of direct contact with Mr. Joseph, during which he administered a series of psychological and intelligence tests. (Mitigation Tr. 207). According to Dr. Graves, Mr. Joseph maintained his innocence and exhibited no anger during their sessions. (Mitigation Tr. 209, 212). He testified that Mr. Joseph remembered his father physically abusing his mother, that he lost his father for a period of time

when his father was incarcerated, and that his stepfather was physically and emotionally abusive to him, beating him with a belt, criticizing him, and calling him names. (Mitigation Tr. 214-215). Dr. Graves opined, "I don't think he's ever felt like he really fit in fully anywhere in the world." (Mitigation Tr. 217). He asserted that Mr. Joseph "had some real difficulties forming an intimate relationship" because of his verbal and communication weaknesses and his lack of "any real clear idea on how to have a relationship with somebody." (Mitigation Tr. 220-221). Dr. Graves testified that Mr. Joseph was easily influenced by others and did not think or plan ahead. (Mitigation Tr. 226, 227). Although Mr. Joseph's overall IQ was average, his verbal IQ was 85, indicating a learning disability and a limited ability to interact with others. (Mitigation Tr. 232). Dr. Graves stated, "I did not find any diagnosable psychological condition other than some generalized long term anxiety and some situational things that I would expect from somebody sitting in jail." (Mitigation Tr. 234-335). He opined that Mr. Joseph did not appear angry and, from a psychological perspective, "doesn't look like somebody who would commit murder." (Mitigation Tr. 237). Dr. Graves believed that Mr. Joseph had the ability to feel some remorse. (Mitigation Tr. 238). He thought it was possible that, after many years of treatment, Mr. Joseph could overcome his denial and accept responsibility for what he had done. (Mitigation Tr. 241). On cross examination, County Prosecutor Bowers asked, "What does learning disabled have to do with kidnapping." (Mitigation Tr. 248).

In his unsworn statement, Mr. Joseph said,

> I am sorry because of the death of Ryan Young. I feel very badly for Ryan Young's parents. I also feel sorry for my parents. Jose Bulerin was a very bad influence on me and, again, I am sorry. I thank you jurors for your consideration.

(Mitigation Tr. 260).

During an in-chambers conference the next day, Defense Counsel Novak objected to exhibits that, in his view, related to the murder but not the kidnapping because the kidnapping was the aggravating circumstance. (Mitigation Tr. 266, 268).

Closing arguments then commenced. Though he did refer to the "principal offender in the commission of the aggravated murder" language, the Assistant County Prosecutor Berry nonetheless described the aggravating circumstance as that contained in the indictment and described the aggravating circumstance as the kidnapping. (Mitigation Tr. 282). Defense Counsel Weller described the aggravating circumstance as the kidnapping. (Mitigation Tr. 303). Defense Counsel Weller argued that the following were mitigating factors: Mr. Joseph's youth and immaturity, his lack of a criminal or juvenile record, the duress of his "psychological defense mechanisms," his lack of aggressiveness, his upbringing, Mr. Bulerin's influence over him, his feelings of remorse, and his capacity for rehabilitation. (Mitigation Tr. 303-311). In his rebuttal, County Prosecutor Bowers twice referred to the aggravating circumstance or specification as the kidnapping. (Mitigation Tr. 315, 320).

In his mitigation instructions to the jury, Judge Basinger read the specification using the "principal offender in the commission of the aggravated murder" language. The sentencing verdict forms were entitled "Jury Recommendation." (Mitigation Tr. 330331). Neither the defense nor prosecution made any objections to the mitigation instructions. (Mitigation Tr. 334).

Jury deliberations began at 11:00 a.m. on 29 January 1991. The court recessed at 6:10 p.m. Deliberations continued the next morning. Judge Basinger received the following message from the jury: "We are deadlocked at this time. One, what happens if this cannot be changed? Two, how long before thē [sic] affects the trial itself?" (Mitigation

Tr. 345). Defense counsel requested the following instruction: "We agree that there are no time limits on the length of your deliberations. If you are deadlocked on the issue of the death penalty, if that is your deadlock, then you must consider either the thirty to life or twenty to life." (Mitigation Tr. 352). Judge Basinger stated, "I don't think they're hung yet. We're not at that point." (Mitigation Tr. 346). He noted that the jury had been deliberating for approximately eight and a half hours and decided that the instruction recommended by the defense was premature. (Mitigation Tr. 352). Judge Basinger answered the jury as follows: "There are no time limits on the length of your deliberations. You must rely upon the instructions of law previously given to you." (Mitigation Tr. 351).

A verdict was returned at 3:30 p.m. on 30 January 1991. The jury recommended a sentence of death. (Mitigation Tr. 355). Before Judge Basinger began his sentencing deliberations, he gave defense counsel an opportunity to address him. Defense Counsel Novak stated, 'The aggravating circumstance in this case was the kidnapping." (Mitigation Tr. 360). During his argument regarding the ninja mask, Defense Counsel Novak apparently wore the mask on his head. (Mitigation Tr. 361).

At 5:30 p.m., Judge Basinger announced Mr. Joseph's sentence. The Judge independently found that the aggravating circumstance outweighed the mitigating factors beyond a reasonable doubt. (Mitigation Tr. 365). He found Mr. Joseph to be "a principal offender" and sentenced him to death. (Mitigation Tr. 365). Judge Basinger added,

> the nature and circumstances of the aggravating circumstance in this case and the heinous nature of the circumstances mandate today's result. This kidnapping and aggravated murder are senseless and horrendous acts resulting in the tragedy which we have seen unfold in this Courtroom the last few

> weeks. This is a tragedy of the loss of a young sixteen year old boy, Ryan Young, as a son, as a brother and as a friend. This is a tragedy that you, Mr. Joseph, are responsible for. I would note that this presents to the Court an appalling waste of life - both as to Ryan Young's and as to you, Mr. Joseph.

(Mitigation Tr. 366). The judge referred to lithe specification of kidnapping." (Mitigation Tr. 365). Judge Basinger stated that the Ohio Public Defender would be appointed to represent Mr. Joseph on appeal. (Mitigation Tr. 367).

On 5 February 1991, a written Judgment Entry on Sentencing was filed. (Ex. C). On 8 February 1991, Judge Basinger filed his written capital sentencing opinion. (Ex. C). The opinion listed the specification with the "principal offender in the commission of the aggravated murder" language. The judge stated that he considered all of the mitigating factors listed in Ohio Revised Code § 2929.04. He found two factors that "rose to the level of mitigating factors": the youth of the defendant and the defendant's lack of a significant history of prior criminal convictions or delinquency adjudications. The court found "no evidence that the defendant was under duress, coercion, or strong provocation and the Court finds that this factor does not rise to the level of a mitigating factor in this case." Judge Basinger continued,

> The evidence of the offender's homelife and family background, albeit an influence upon the defendant, does not rise to the level of a mitigating factor. The learning disability of the defendant likewise does not rise to the level of a mitigating factor. In addition, any influence by the co-defendant, Jose Bulerin, upon the defendant has not been adequately established by testimony or exhibits so as to establish a mitigating factor.

(Ex. C). He concluded,

> The particularly heinous kidnapping associated with the Aggravated Murder was a calculated act for which the defendant was responsible. The nature and circumstances of the proven specification provide no indicia of justification and indicate to the Court a brutally planned and ruthless act. The aggravated circumstances were lurid; the mitigating factors were negligible and provide no reduction or lessening of the defendant's blame. For those reasons, the Court finds that the aggravating circumstance outweighs mitigating factors under Revised Code 2929.03.

(Ex. C). The judge referred to the aggravating circumstance as "a kidnapping specification."

B. Direct Appeal

1. Third District Court of Appeals

William Kluge was appointed as co-counsel for Mr. Joseph on 23 July 1991, joining Defense Counsel Randall Dana and Kathleen A. McGarry. (Ex. EK at 1v). Mr. Joseph filed a notice of appeal of his conviction and sentence of death on 7 March 1992. (Ex. EJ). Mr. Joseph raised the following assignments of error in the Third District Court of Appeals:

> ASSIGNMENT OF ERROR NO. I
>
> The indictment filed against Richard E. Joseph did not set forth an offense for which the sentence of death may be imposed and therefore the sentence imposed in this case is void.
>
> ASSIGNMENT OF ERROR NO. II
>
> The trial court erred in denying Appellant Joseph's motion for change of venue.
>
> ASSIGNMENT OF ERROR NO. III

The trial court erred in denying Mr. Joseph's motion for a mistrial when it was revealed during trial that the prosecution failed to disclose exculpatory immunity material to the defense during discovery as required by Criminal Rule 16(b), thus violating Appellant Joseph's rights as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

ASSIGNMENT OF ERROR NO. IV

The trial court erred to the prejudice of Appellant Joseph by giving erroneous instructions of law at the guilt-innocence phase of his capital trial.

ASSIGNMENT OF ERROR NO. V

The trial court erred to the prejudice of Appellant Joseph by giving erroneous instructions at the penalty phase of appellant's capital trial.

ASSIGNMENT OF ERROR NO. VI

The trial court considered erroneous evidence and failed to consider proper mitigating evidence in imposing the death penalty on Appellant Joseph.

ASSIGNMENT OF ERROR NO. VII

The prosecutor's misconduct throughout Appellant Joseph's capital trial denied appellant his due process right to a fair trial.

ASSIGNMENT OF ERROR NO. VIII

The death sentence in Appellant Joseph's case is both unreliable and inappropriate.

ASSIGNMENT OF ERROR NO. IX

The death sentence in Appellant Joseph's case was excessive and disproportionate, thereby resulting in

the arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Section 9, Article I of the Ohio Constitution.

ASSIGNMENT OF ERROR NO. X

It is error to deny appellate counsel an opportunity to review the entire appellate record which includes grand jury transcripts and witness statements not disclosed to defense counsel.

ASSIGNMENT OF ERROR NO. XI

The weight and sufficiency of the evidence presented by the State does not meet the legal requirements to sustain a conviction.

ASSIGNMENT OF ERROR NO. XII

The trial court erred in failing to excuse three jurors for cause after voir dire indicated they could not be fair.

ASSIGNMENT OF ERROR NO. XIII

Appellant Joseph was denied a fair trial and his rights as guaranteed by the Sixth and Fourteenth Amendments due to the ineffective assistance of his counsel.

ASSIGNMENT OF ERROR NO. XIV

The trial court erred when it permitted two photographs and the remainder of the State's exhibits to go to the jury at the penalty phase of Appellant Joseph's capital trial, thus violating his right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution.

ASSIGNMENT OF ERROR NO. XV

The trial court's supplemental charge given to the jury during the penalty phase deliberations of appellant's capital trial was coercive, inappropriate, and violated appellant's right to a fair trial under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 5,6, and 16, Article I of the Ohio Constitution.

ASSIGNMENT OF ERROR NO. XVI

Appellant Joseph's right to due process as guaranteed by the Fifth and Fourteenth's Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution was violated when the court allowed appellant to be excluded from in-chamber conferences between the court, the prosecution and appellant's counsel.

ASSIGNMENT OF ERROR NO. XVII

The trial court erred to the prejudice of the appellant by allowing the admission of expert opinion testimony that was not properly qualified or based on reasonable scientific certainty, thus denying Appellant Joseph the due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Constitution.

ASSIGNMENT OF ERROR NO. XVIII

The trial court erred by admitting into evidence, over defense counsel's objection, three pre-arrest statements and one post-arrest statement made by appellant to the police.

ASSIGNMENT OF ERROR NO. XIX

The trial court erred to the prejudice of Appellant Joseph by admitting into evidence inflammatory,

duplicative, and gruesome photographs and videotape.

ASSIGNMENT OF ERROR NO. XX

The trial court erred in admitting into evidence two knives that were not shown to have any connection with this case.

ASSIGNMENT OF ERROR NO. XXI

The trial court erred in allowing testimony concerning "scientific evidence. "

ASSIGNMENT OF ERROR NO. XXII

The trial court erred in admitting State's Exhibit 21, a black bag and its contents, into evidence when no foundation was laid that it belonged to Appellant Joseph.

ASSIGNMENT OF ERROR NO. XXIII

The trial court erred by allowing the State's continual use of leading questions of its own's [sic] witness[es] in violation of Evid. R. 611 (c).

ASSIGNMENT OF ERROR NO. XXIV

The trial court erred in allowing the admission of hearsay evidence.

ASSIGNMENT OF ERROR NO. XXV

The trial court erroneously overruled the defense motion to allow for the videotaping of voir dire.

ASSIGNMENT OF ERROR NO. XXVI

The trial court erred by limiting defense counsel's voir dire on mitigating factors.

ASSIGNMENT OF ERROR NO. XXVII

The trial court erred in allowing the prosecutor to use language saying the jury only "recommends" the death penalty.

ASSIGNMENT OF ERROR NO. XXVIII

The questions asked by the judge during the individual sequestered voir dire tended to "death-qualify" the jury, and deprived the appellant of a fair and impartial panel.

ASSIGNMENT OF ERROR NO. XXIX

The trial court erred to the prejudice of Appellant Joseph in allowing the prosecutor to perempt [sic] jurors with reservations about the death penalty.

ASSIGNMENT OF ERROR NO. XXX

The trial court erred in denying Mr. Joseph's motion to allow alternating voir dire.

ASSIGNMENT OF ERROR NO. XXXI

The trial court erred in allowing the testimony of Steve Heuerman and in failing to declare a mistrial.

ASSIGNMENT OF ERROR NO. XXXII

The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I of the Ohio Constitution establish the requirements for a valid death penalty scheme. Ohio Revised Code, Section 2903.01, 2929.02, 2929.021,2929.022,2929.023,2929.03,2929.04, and 2929.05, Ohio's statutory provisions governing the imposition of the death penalty, do not meet the prescribed constitutional requirements and are unconstitutional, both on their face and as applied.

(Ex. EK at xlviii-liii).

On 23 December 1993, the Third District Court of Appeals affirmed both the conviction and the sentence of death. (Ex. EP). The Court of Appeals rejected Mr. Joseph's 32 assignments of error and independently found that the aggravating circumstance outweighed the mitigating factors beyond a reasonable doubt. (Ex. EP, EO). It also determined that the application of the death penalty was not excessive or disproportionate to the penalty imposed in similar cases. (Ex. EP, EO).

2. Supreme Court of Ohio

On 20 January 1994, Mr. Joseph filed a notice of appeal to the Supreme Court of Ohio. (Ex. ES). In his appeal to the Ohio Supreme Court, Mr. Joseph was represented by Kathleen A. McGarry, David Bodiker, and Joseph Bodine Jr. (Ex. ET). Mr. Joseph presented 36 propositions of law to the Supreme Court of Ohio:

PROPOSITION OF LAW NO. I

An indictment that fails to set forth an offense for which the sentence of death may be imposed is invalid as to the capital offense and the death sentence which resulted is void.

PROPOSITION OF LAW NO. II

The proper remedy for the State's willful failure to disclose that its chief witness has been granted immunity is a mistrial or the striking of the witness['s] testimony.

PROPOSITION OF LAW NO. III

When a death sentence is both unreliable and inappropriate it must be vacated and a life sentence imposed.

PROPOSITION OF LAW NO. IV

When the death sentence is excessive and disproportionate to the sentence in similar cases the death sentence must be vacated and a life sentence imposed.

PROPOSITION OF LAW NO. V

When every single potential juror in a capital trial has been exposed to pre-trial publicity and victim impact evidence, it is an abuse of discretion for the trial court to deny the defendant's motion for change of venue.

PROPOSITION OF LAW NO. VI

A trial court denies a capital defendant the right to a fair trial and to due process of law [when] it erroneously instructs the jury during the guilt-innocence phase of a capital case.

PROPOSITION OF LAW NO. VII

Erroneous instructions at the penalty phase of a capital case result in an unreliable determination of the proper penalty in a capital trial.

PROPOSITION OF LAW NO. VIII

When a trial court fails to consider mitigating evidence presented during the penalty phase of a capital case and considers erroneous aggravating circumstances in making its determination to impose the death sentence the death sentence must be vacated.

PROPOSITION OF LAW NO. IX

When a prosecutor's pattern of misconduct throughout both phases of a capital trial and closing argument deprive a capital defendant of a fair trial the appropriate remedy is a new trial.

PROPOSITION OF LAW NO. X

A reviewing court may not apply a new rule of law in an ex post fact[o] manner when the new rule reduces the State's burden of supporting a capital conviction.

PROPOSITION OF LAW NO. XI

A conviction for aggravated murder may not be sustained when the evidence presented does not meet the legal requirements to prove the elements of the crime.

PROPOSITION OF LAW NO. XII

When the trial court allows a capital jury to hear prejudicial irrelevant evidence a mistrial should be declared.

PROPOSITION OF LAW NO. XIII

The failure to object to numerous errors at trial, to adequately address substantial capital issues, and to prepare a meaningful penalty phase case deprives a capital defendant of the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution, [and] Article I, Sections 10 and 16 of the Ohio Constitution.

PROPOSITION OF LAW NO. XIV

When the trial court refuses to instruct a jury to select one of the available life sentences after the jury informs the court that it is deadlocked on the death penalty, a capital defendant is denied the right to a fair trial and a reliable sentencing determination in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 5, 6 and 16, Article I of the Ohio Constitution.

PROPOSITION OF LAW NO. XV

When a trial court in a capital trial erroneously denies a challenge for cause against a juror who is biased,

reversible error occurs when the defendant is forced to use a peremptory challenge to remove the juror.

PROPOSITION OF LAW NO. XVI

Exhibits that have been admitted into evidence in the guilt—innocence phase of a capital case can only be readmitted in the penalty phase if they are relevant to the aggravating circumstances proved in the guilt-innocence phase or to mitigating factors presented in the penalty phase.

PROPOSITION OF LAW NO. XVII

A criminal defendant has a right to be present at all proceedings, including in-chambers conferences, unless he voluntarily absents himself from the proceeding.

PROPOSITION OF LAW NO. XVIII

When a trial court permits the admission of expert opinion testimony that is not properly qualified or based on reasonable scientific certainty, a capital defendant is denied his right to a fair trial and to due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution.

PROPOSITION OF LAW NO. XIX

When a trial court admits into evidence statements by a defendant which were not knowingly, voluntarily and intelligently given, the defendant is denied his rights to a fair trial and against self-incrimination in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 2,9,10 and 16 of the Ohio Constitution.

PROPOSITION OF LAW NO. XX

When gruesome and prejudicial photographs are admitted into evidence even though their prejudicial effect

outweighs their probative value, a capital defendant is denied his rights to a fair trial, due process of law, and a reliable sentencing determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution [and] Article I, Sections 10 and 16 of the Ohio Constitution.

PROPOSITION OF LAW NO. XXI

A trial court should refuse to allow the introduction or admission of evidence unless the State can clearly show that the evidence it seeks to introduce is related to the defendant or the crime with which he is charged.

PROPOSITION OF LAW NO. XXII

A witness may testify as an expert if the witnesses [sic] testimony is based on reliable scientific, technical, or other specialized information to the extent that the testimony reports the result of a procedure, test, or experiment and the testimony is reliable.

PROPOSITION OF LAW NO. XXIII

Evidence is not admissible against a defendant unless the State first establishes that a foundation exists to tie the evidence to the defendant.

PROPOSITION OF LAW NO. XXIV

Absent any indication that a witness is hostile, an adverse witness, or a witness identified with an adverse party, questioning by use of leading questions on direct examination is prohibited.

PROPOSITION OF LAW NO. XXV

Hearsay evidence which lacks any indication of trustworthiness is inadmissible.

PROPOSITION OF LAW NO. XXVI

A capital defendant is denied a fair trial when the trial court refuses to permit the voir dire to be videotaped.

PROPOSITION OF LAW NO. XXVII

When a trial court unduly restricts voir dire related to mitigation and sentencing issues, a capital defendant is denied a fair trial and reliable sentencing determination.

PROPOSITION OF LAW NO. XXVIII

The statements from the prosecutor that the jury's verdict at the penalty phase was only a recommendation violated the Eighth and Fourteenth Amendments to the United States Constitution as well as Article I, Sections 2, 9 ,10 and 16 of the Ohio Constitution.

PROPOSITION OF LAW NO. XXIX

A trial court deprives a capital defendant [of] the right to a fair and impartial jury when it asks questions during an individual sequestered voir dire which tend to "death qualify" the jury.

PROPOSITION OF LAW NO. XXX

The trial court erred to the prejudice of Appellant Joseph in allowing the prosecutor to perempt [sic] jurors with reservations about the death penalty.

PROPOSITION OF LAW NO. XXXI

A capital defendant is denied the right to a fair trial and to due process of law when the trial court refuses to allow alternating voir dire.

PROPOSITION OF LAW NO. XXXII

After a witness testifies, the trial court should conduct an in camera inspection of the witness's written statement with the defense counsel and the prosecuting attorney present and participating to determine any inconsistencies

between the witness's testimony and any prior statement. (Ohio R. Crim. P. 16(8)(1)(g) applied).

PROPOSITION OF LAW NO. XXXIII

When a trial court, on its own, orders the grand jury transcripts to be transcribed and then treats the transcripts as if they were witness statements pursuant to Ohio R. Crim. P. 16(8)(1)(g) the grand jury transcripts should be turned over to defense counsel for inspection.

PROPOSITION OF LAW NO. XXXIV

On direct appeal as of right to the court of appeals in a capital case, a capital appellant is entitled to the review of his entire record by the court of appeals.

PROPOSITION OF LAW NO. XXXV

The State has an obligation to preserve evidence used to secure a conviction in a capital case.

PROPOSITION OF LAW NO. XXXVI

The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2,9,10 and 16, Article I of the Ohio Constitution establish the requirements for a valid death penalty scheme. Ohio Revised Code, Section 2903.01, 2929.02, 2929.021,2929.022,2929.023,2929.03,2929.04, and 2929.05, Ohio's statutory provisions governing the imposition of the death penalty, do not meet the prescribed requirements and thus are unconstitutional, both on their face and as applied.

(Ex. ET).

On 30 August 1995, the Supreme Court of Ohio, in a 4-3 decision, affirmed Mr. Joseph's conviction and death sentence. (Ex. EY, 73 Ohio St. 3d 450, 454-55 (1985)). While not addressing all propositions of law in opinion form, it "fully reviewed the record and passed upon each proposition

prior to reaching its decision." 73 Ohio St. 3d at 45455. For those propositions it addressed in its opinion, the Supreme Court of Ohio specifically concluded that:

- Though the indictment was "flawed" because it inaccurately stated the death penalty specification contained in O.R.C. § 2929.04(A)(7), this error does not render the indictment invalid because it "sufficiently notified appellant of the charge against him and the death-penalty specification."
- The prosecution violated Ohio Crim. R. 16(B)(1)(f) by failing to disclose exculpatory information prior to trial; namely that William Forest, a witness for the state, had been granted immunity. However it found this violation did not mandate a reversal of the conviction because it was not willful and appellant did not suffer any prejudice from the initial nondisclosure.
- There was "sufficient evidence adduced at trial to convince the trier of fact that appellant was guilty beyond a reasonable doubt of the kidnapping and murder of Ryan Young and that he was the principal offender in the commission of the aggravated murder."
- The probative value of the photographs and a videotape of the crime scene as well as autopsy slides, introduced as evidence, outweighed any danger of material prejudice to Mr. Joseph.
- Penalty phase jury instructions were not erroneous.

73 Ohio St. 3d at 455-61. In addition, the Supreme Court of Ohio independently determined that the aggravating circumstance outweighed the mitigating factors beyond a reasonable doubt. *Id.* at 462-63. In comparison to other felony-murder cases involving kidnapping, it also concluded

that the sentence of death was appropriate and neither excessive nor disproportionate. *Id.* at 463.

In dissent, three justices concluded that there was insufficient evidence to support a finding beyond a reasonable doubt that Mr. Joseph was the principal offender in the death of Ryan Young *Id.* at 463 and 469-70. Moreover, two of these three justices also found that the grand jury indictment issued against Mr. Joseph did not contain a specification upon which a death sentence could legally be based. *Id.* at 463-69.

On 11 September 1995, Mr. Joseph moved for reconsideration on the issues of the invalid indictment and corresponding erroneous jury instruction, the insufficiency of evidence on the "principal offender" element, and the inappropriateness of the death penalty. (Ex. FC). The Supreme Court of Ohio denied Mr. Joseph's motion for reconsideration on 18 October 1999. (Ex. FE).

3. United States Supreme Court

Mr. Joseph filed his petition for writ of certiorari with the United States Supreme Court on 17 January 1996. (Ex. FF). He presented the following question:

> Is it a structural error for a jury to convict and sentence a defendant to death for a capital offense, even though that offense was never properly charged in an indictment nor was the jury ever instructed on that capital offense?

(Ex. FF at i). The United States Supreme Court denied Mr. Joseph's petition. (Ex. FI).

C. <u>Ohio Post-Conviction Proceedings</u>

1. Court of Common Pleas

a. Petition for Post-Conviction Relief

On 20 September 1996, Mr. Joseph filed a petition to vacate or set aside his sentence, pursuant to Ohio R.C. § 2952.21, with the Allen County Court of Common

Pleas. (Ex. FJ). He presented the following five claims for relief:

1. He was denied the effective assistance of counsel at trial in violation of the Sixth and Fourteenth Amendments. (Ex. FJ, at 1118).

2. He was denied his constitutional right to a trial by a fair and impartial jury in violation of the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 5 and 16 of the Ohio Constitution. (Ex. FJ, at ¶¶52-53 and 61).

3. The State's failure to preserve a certain piece of evidence, a knife in sheath admitted at trial as State's Exhibit 61 (A), denied him due process rights guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section 16 of the Ohio Constitution. (Ex. FJ, at ¶¶ 66 and 74).

4. The proportionality review applied to his case on appeal was constitutionally defective violating the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 2,9, and 16 of the Ohio Constitution. (Ex. FJ, at ¶¶ 80 and 87-89).

5. His constitutional rights were violated due to the imposition and planned execution of his death sentence by electrocution. (Ex. FJ, at ¶¶119-121).[9]

In his petition, Mr. Joseph requested an evidentiary hearing. (Ex. FJ). In pursuing post-conviction relief, Mr. Joseph also filed a motion for leave to conduct additional

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[9] Paragraphs 120 and 121 of Mr. Joseph's petition were incorrectly numbered 110 and 111.

discovery in support of post-conviction relief, a motion for an order directing a complete copy of the files in Case No. CR90-07-0325 maintained by the Allen, Logan, and Auglaize County Sheriffs Departments be turned over to the court for *in camera* review, and an *ex parle* motion for funds to employ experts.

b. Exhibits

Mr. Joseph attached 24 exhibits to his brief in support of his petition for postconviction relief. Exhibits A-C, E-F, and J relate to the alleged ineffectiveness of Mr. Joseph's trial counsel. Exhibit A consists of an affidavit by attorney Jeffrey Kelleher, who opined that Mr. Joseph's trial counsel was ineffective. In Exhibit 8, attorney Dennis Pusateri, co-counsel for co-defendant Mr. 8ulerin, offered numerous criticisms of Mr. Joseph's trial counsel, Greg Novak and Mark Weller. Mr. Pusateri and his co-counsel, Mr. Reinhart, attempted to work out a plea bargain that would save both Mr. Bulerin and Mr. Joseph's lives. According to Mr. Pusateri, he was asked by Mr. Joseph's attorneys to "talk to Mr. Joseph about considering a plea bargain to save his life." While he and Mr. Reinhart were purportedly able to convince Mr. Joseph to take the plea bargain, Mr. Joseph withdrew from the plea arrangement on the eve of trial due to, in Mr. Pusateri's view, the lack of trust of his own attorneys.

Exhibit C is an affidavit by Gary Ericson who was hired by Mr. Joseph's cocounsel Mr. Weller to investigate and prepare mitigation materials for a possible penalty phase in Mr. Joseph's capital case. Mr. Ericson detailed his inexperience in capital cases, Mr. Weller's failure to explain his role or the theory of the case, and his opinion that the mitigation information should have been handled differently. In Exhibit E, Dr. Jeffrey L. Smalldon, a licensed psychologist, detailed his clinical findings based on his multiple interviews with Mr. Joseph, data obtained through numerous psychological and neuropsychological tests, and

his review of background information. Dr. Smalldon also commented unfavorably on the mitigation evidence presented by Mr. Joseph's trial counsel and expressed his opinion, offered within reasonable psychological certainty, that had Mr. Joseph's counsel placed added emphasis on the functional implications of Mr. Joseph's learning disability and his long history of troubled relationships a different sentencing recommendation may well have resulted. Exhibit F is an affidavit by April Joseph, Mr. Joseph's cousin, in which she explained that she was subpoenaed by the prosecution to testify against Mr. Joseph and that Mr. Joseph's counsel never talked to her prior to her testimony. In her affidavit, Ms. Joseph also provided examples of some purportedly positive testimony she could have given, if asked by Mr. Joseph's counsel. Exhibit J consists of ten letters written by Mr. Joseph's trial counsel, Mr. Novak, to media personnel cancelling his previously issued subpoenas seeking testimony on the need for a change in venue. In each of these letters, Mr. Novak explains that the individual's testimony is no longer necessary because "a jury will no longer be used in this matter."

Exhibit D is a resume for Dr. Jacqueline D. Morgan, a licensed psychologist. Exhibit G is a letter from Frank Dine, Mr. Joseph's supervisor at Frank's Car Wash. Exhibit H consist of records from the Allen County Sheriffs office. Exhibit I is a letter from Father Gary Walters who has met with Mr. Joseph since his incarceration in the Allen County Jail. Exhibit K contains local newspaper articles, dated from 27 June 1990 to 12 January 1991, on Ryan Young's disappearance and murder as well as Mr. Joseph's arrest and impending murder trial. Exhibit L is an affidavit by Susan Thomas, the court reporter during Mr. Joseph's trial.

Exhibits M and N identify the type of proportionality reviews conducted on death penalty sentences in other states, if any, and cite to relevant state statutes and case law.

Exhibits O-X relate to Mr. Joseph's argument that electrocution as a means of carrying out a death sentence is cruel and unusual punishment. Exhibit O is a 23 January 1994 article from the Philadelphia Inquirer entitled "Killing by the Book: Executions Are Gruesome and Horrifying - Just Ask the Witnesses," Exhibit P details Ohio's electrocution procedure. Exhibits Q-V consist of autopsies of Theodore Bundy, Jesse Tafero, Ronald Straight, Willie Darden, Jeffrey Daughtery, and Aubrey Adams, individuals put to death by electrocution. In Exhibit W, Michael Radelet, a Ph.D sociologist, provided 18 examples of "botched" executions in which there were "unanticipated problems or the duration of the execution (over thirty minutes) caused prolonged agony for the prisoner." Seven of these executions involved electrocutions. In another affidavit, Exhibit X, attorney Dale Baich described his experience as a state-appointed witness of the execution of John J. Joubert in Nebraska.

c. Decision Dismissing Petition for Post-Conviction Relief

On 6 November 1996, Judge Randall L. Basinger issued his Findings of Fact and Conclusions of Law. (Ex. FQ). Judge Basinger concluded that the doctrine of res judicata barred Mr. Joseph from reasserting all five of his claims for relief and, therefore, dismissed his petition for post-conviction relief. Judge Basinger also denied Mr. Joseph's motions for leave to conduct additional discovery, for an *in camera* review of possible exculpatory materials in sheriff department files, and for funds to employ experts.

2. Third District Court of Appeals

On 5 December 1996, Mr. Joseph filed his notice of appeal to the Ohio Court of Appeals. (Ex. FR). He presented the following assignments of error:

ASSIGNMENT OF ERROR NO. I

The trial court erred by denying petitioner's motions and dismissing his post conviction petition without first granting a hearing.

ASSIGNMENT OF ERROR NO. II

The trial court erred in failing to grant relief or an evidentiary hearing on the claim of ineffective assistance of counsel.

ASSIGNMENT OF ERROR NO. III

The trial court erred in failing to grant an evidentiary hearing or relief on his claim that a change of venue should have been granted in this case.

ASSIGNMENT OF ERROR NO. IV

The trial court erred in failing to grant an evidentiary hearing or relief on petitioner's claim that the state failed to preserve evidence against him.

ASSIGNMENT OF ERROR NO. V

The trial court erred in failing to grant an evidentiary hearing or relief on petitioner's claim concerning the proportionality review procedure in Ohio.

ASSIGNMENT OF ERROR NO. VI

The trial court erred in failing to grant relief or an evidentiary hearing on petitioner's claim that the use of electrocution and lethal injection as methods of execution violate the Eighth Amendment's guarantee against cruel and unusual punishment.[10]

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[10] In his petition for postconviction relief, Mr. Joseph's cruel and unusual punishment arguments relate solely to execution by electrocution. (Ex. FJ). In appealing the dismissal of his petition, Mr. Joseph responds briefly to the State's argument that, since Mr. Joseph may elect to be

(Ex. FS).

On 17 July 1997, the Court of Appeals overruled these assignments of error and affirmed the Court of Common Pleas' dismissal of Mr. Joseph's petition. (Exs. FWand

FX).

3. Supreme Court of Ohio

Mr. Joseph filed his notice of appeal to the Supreme Court of Ohio on 29 August 1997. (Ex. FY). In his memorandum in support of jurisdiction, he raised the following propositions of law:

PROPOSITION OF LAW NO. I

A capital defendant is denied his due process rights as guaranteed by the fifth and fourteenth amendments to the United States Constitution and Article I, §16, Ohio Constitution, when the postconviction process he experiences is not an adequate corrective process.

PROPOSITION OF LAW NO. II

The trial court erred when it failed to grant relief or an evidentiary hearing after appellant presented evidence *dehors* that trial counsel were ineffective violating his rights as guaranteed by the sixth and fourteenth amendments to the United States Constitution and Article I, § 10 and 16, Ohio Constitution.

PROPOSITION OF LAW NO. III

The trial court erred in failing to order a change of venue thus forcing appellant to be tried in a county where a fair and impartial jury could not be secured, in violation of his rights as guaranteed by the sixth and fourteenth amendments to the United States Constitution and §§5 and 16, Article I, Ohio Constitution.

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executed by lethal injection, his argument on the alleged cruelty of electrocution must fail. (Ex. FS, at 38-39).

PROPOSITION OF LAW NO. IV

The trial court erred in not granting a hearing to address the state's failure to preserve evidence against appellant thus violating rights guaranteed to him by the fifth and fourteenth amendments to the United States Constitution and §16, Article I of the Ohio Constitution.

PROPOSITION OF LAW NO. V

The trial court erred when it failed to grant relief or and [sic] evidentiary hearing after appellant presented evidence that the proportionality review system in Ohio violates constitutional rights as guaranteed by the fifth, sixth, eighth and fourteenth amendments to the United States Constitution and §§2, 9, and 16, Article I, Ohio Constitution.

PROPOSITION OF LAW NO. VI

The trial court erred in failing to granting [sic] an evidentiary hearing or relief after appellant presented evidence that electrocution and lethal injection violate the eighth amendment's guarantee against cruel and unusual punishment, thus violating his rights as guaranteed by the fifth, eighth, ninth, tenth and fourteenth amendments to the United States Constitution and §§1, 2,5,9,10, 16, and 20, Article I, Ohio Constitution.

(Ex. FZ at i-ii).

On 12 November 1997, the Supreme Court of Ohio declined jurisdiction to hear the case. (Ex. G8).

D. <u>Federal Petition for Writ of Habeas Corpus</u>

On 5 March 1998, Mr. Joseph filed, in federal court, a notice of intention to file a habeas corpus petition, a motion for appointment of counsel, and a motion to proceed *in forma pauperis*. (Docket #1, #4, and #5). On 1 April 1998, this Court granted Mr. Joseph's application for leave to proceed *in forma pauperis* and appointed attorneys Kevin M.

Spellacy and Edmund W. Searby to represent him. (Docket #6). Mr. Joseph filed his initial petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. (Docket #10). A return of writ was subsequently filed. (Docket #14). On 17 December 1998, though no specific date for his execution had been set, the Court issued an order staying Mr. Joseph's execution pending the resolution of his petition. (Docket #32).

After some discovery transpired, Mr. Joseph filed, on 16 February 1999, an amended petition for a writ of habeas corpus. (Docket #43). The State filed its amended return of writ on 15 March 1999. (Docket #49). On 30 April 1999, Mr. Joseph filed his traverse. (Docket #57). On 13 July 2001, Mr. Joseph filed his second amended petition for a writ of habeas corpus, pursuant to 28 U.S.C. 2254. (Docket #83). The State filed its second amended return of writ on 10 August 2001. (Docket #85). On 9 October 2001, Mr. Joseph filed his amended traverse. (Docket #89).

1. Claims for Relief

In his second amended petition for a writ of habeas corpus, Mr. Joseph presents the following grounds for relief:

FIRST GROUND FOR RELIEF

An indictment that fails to set forth the elements and provide notice of an offense for which the sentence of death may be imposed is invalid as to the capital offense and the death sentence which resulted is void.

SECOND GROUND FOR RELIEF

The trial court compounded the error in the indictment and misinstructed the jury as to the proper specification for a sentence of death.

THIRD GROUND FOR RELIEF

There was insufficient evidence to determine that Mr. Joseph was the actual killer.

FOURTH GROUND FOR RELIEF

The State withheld material exculpatory evidence.

FIFTH GROUND FOR RELIEF

The prosecutors' pattern of misconduct throughout both phases of the capital trial deprived Joseph of his constitutional rights to a fair trial.

SIXTH GROUND FOR RELIEF

The trial court created prejudice *per se* in denying change of venue where every single juror in a capital trial has been exposed to pretrial publicity and victim impact information.

SEVENTH GROUND FOR RELIEF

The trial court improperly denied challenges for cause.

EIGHTH GROUND FOR RELIEF

Joseph was denied his right to the effective assistance of counsel in violation of the sixth and fourteenth amendments to the United States Constitution.

NINTH GROUND FOR RELIEF

The trial court admitted into evidence statements by a defendant which were not knowingly, voluntarily and intelligently given, in violation of the fifth, sixth, and fourteenth amendments to the United States Constitution.

TENTH GROUND FOR RELIEF

The evidence was insufficient to prove the crime of aggravated murder.

ELEVENTH GROUND FOR RELIEF

The court's voir dire concerning the death penalty exceeded the bounds set under Witherspoon v. Illinois and the United States Constitution.

TWELFTH GROUND FOR RELIEF

The trial court unconstitutionally determined a sentence of death.

THIRTEENTH GROUND FOR RELIEF

The trial court erred in admitting untrustworthy hearsay that placed a car often driven by petitioner at the scene of the crime.

FOURTEENTH GROUND FOR RELIEF

The trial court's erroneous admission of highly prejudicial evidence violated the fundamental fairness of the trial.

FIFTEENTH GROUND FOR RELIEF

The trial court denied the defendant the right to be present at all proceedings.

SIXTEENTH GROUND FOR RELIEF

Joseph was denied meaningful proportionality review and his death sentence is in fact disproportionate in violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

SEVENTEENTH GROUND FOR RELIEF

The trial court's admission of expert opinion testimony that is not properly qualified or based on reasonable scientific certainty, violated Joseph's rights to a fair trial and due process of law under the fourteenth amendment.

EIGHTEENTH GROUND FOR RELIEF

The trial court failed to conduct an in camera inspection of the witness's written statement with the defendant counsel [sic] and the prosecuting attorney present and participating to determine any inconsistencies between the witness's testimony and any prior statement thus violating the petitioner's due process rights.

NINETEENTH GROUND FOR RELIEF

Richard Joseph's death sentence is constitutionally infirm because Ohio's capital punishment system operates in an arbitrary and capricious manner.

TWENTIETH GROUND FOR RELIEF

Richard Joseph's convictions [sic] and death sentences [sic] are invalid under the federal guarantees of due process, reasonable notice, equal protection, the effective assistant [sic] of counsel, a fair tribunal, an impartial jury, and a reliable sentence due to the cumulative errors in the admission of evidence and instructions, gross misconduct by state officials and witnesses, and the systematic deprivation of his rights to the effective assistance of counsel.

(Docket #83).

2. Discovery and Supplemental Record

During the litigation of Mr. Joseph's habeas petition, several motions were filed relating to discovery, evidentiary hearings, and supplementation of the record.

a. Petitioner's First Motion for Leave to Conduct Discovery and Related Motions to Supplement the Record

On 5 June 1998, Mr. Joseph filed a motion for leave to conduct discovery on "the concealment by the prosecution of exculpatory evidence, including information concerning the principal witness William Forest" and on "excessive pretrial publicity and juror bias." (Docket #13, at 4). On 13 August 1998, the Court granted in part his motion for leave to conduct discovery. (Docket #23). In its order, the Court found that Mr. Joseph had demonstrated good cause that he was entitled to some discovery, but also concluded that the requested discovery, in some respects, extended beyond an

appropriate scope. (Docket #23, at 3 and 5). Accordingly, the Court ordered that:

- Joseph may depose William Forest;
- Respondent shall disclose all interview notes and memoranda concerning Forest created by the officers involved in the investigation and arrest of Forest for the time period between the crime for which Joseph was convicted and the end of Joseph's trial;
- Respondent shall disclose any tapes or transcripts of interviews of Forest conducted by the officers involved in the investigation and arrest of Forest for the time period between the crime for which Joseph was convicted and the end of Joseph's trial;
- Joseph may depose the officers involved in the investigation and arrest of Forest;
- Respondent shall disclose all information relating to Forest's hiring by the Allen County Sheriff's Office;
- Joseph may depose those persons involved in Forest's hiring by the Allen County Sheriff's Office; and,
- Joseph may subpoena the broadcast logs and videotapes of the electronic media in Allen County which depict the details of the crime for which Joseph was convicted and Joseph's prosecution and trial for the time period between the crime and the end of Joseph's trial.

(Docket #23, at 3-5). The Court however denied Joseph's request to review, for "nondisclosed exculpatory information," the investigative files of the Allen and Auglaize County Sheriff's Offices along with prosecution files as not sufficiently specific or supported. (Docket #23, at 3). The Court similarly denied Joseph's requests for the disclosure of the grand jury minutes and for "such other

reasonable discovery that may become necessary." (Docket #23, at 3).

On 17 February 1999, the Court granted in part and denied in part petitioner's unopposed motion to supplement the record. (Docket #44). Accordingly, the following exhibits have been incorporated into the record:

PSA:[11] Rule 30(B)(6) deposition of the Allen County Sheriff's Office (Larry Van Horn), 9 October 1998.

PSB: Deposition of William Forest, 13 October 1998.11 PS stands for "petitioner" and "supplementary" and thus Ex. PSA refers to Exhibit A from petitioner's supplementary exhibits.

PSC: Deposition of James A. Ketchum, 11 January 1999.

PSD: Deposition of Larry Van Horn, 11 January 1999.

PSE: Deposition of William Dailey, 11 January 1999.

PSF: Continued deposition of William Forest, 11 January 1999.

PSG: Deposition of David Bowers, 11 January 1999.

PSH: Grand jury testimony of William Forest.

PSI: Supplemental Offense Report: 06/28/90 report of interview of William B. Forrest (sic) by Detective Sergeant Jack L. Cheney.

PSJ: "Personality assessment of one William Forest," undated.

PSK: Arrest record for William Forest.

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[11] PS stands for "petitioner" and "supplementary" and thus Ex. PSA refers to Exhibit A from petitioner's supplementary exhibits.

PSL: Arrest inquiry for William Forest.

PSM: "Statement taken from one William Forrest (sic)" by Detective Jim Ketchum on 4 July 1990.

PSN: "Pre-interrogation Advise of Rights" form for William Forest for 4 July 1990.

PSO: Van Horn rough notes of interview of William Forest.

PSP: Statement taken of William B. Forest by Inspectors William Dailey and Larry Van Horn on 7 July 1990.

PSQ: "Pre-interrogation Advise of Rights" form for William Forest for 7 July 1990.

PSR: Rough interview notes for 7 July 1990.

PSS: Inventory of statements for case #90-09762.

PST: Memorandum of Sheriff Dan Beck to Larry Van Horn, dated 6 February 1996.

PSU: Memorandum of Inspector Larry Van Horn to Sheriff Daniel W. Beck, dated 21 February 1996.

PSV: Allen County Sheriff's Department Information Record for informant Tony Newland, dated 28 June 1990.

PSW: Statement taken from Thad Randall Staley on 10 September 1990 by Inspector Larry Van Horn.

PSX: Allen County Sheriff's Office Vehicle Impound Record, dated 4 July 1990.

PSY: Vehicle inventory form.

PSZ: Partial Case Activity Summary.

PSAA: Ryan Young disappearance log.

PSBB: Certificate of Appointment for William Forest as Special Deputy Sheriff.

PSCC: Affidavit of Susan Thomas.

PSDD: Portfolio of newspaper coverage.

PSEE: Transcript of instructions to the grand jury.

PSFF: Letter Dr. Mak to Judge Basinger of the Allen County Court of Common Pleas regarding Gregory Novak's medical condition.

(Docket #46 and #65).[12] The Court denied, as premature, petitioner's request to further supplement the record with documents that he did not yet have in his possession. (Docket #44, at 2).

On 3 March 1999, the Court granted in part and denied in part petitioner's second unopposed motion to supplement the record. (Docket #48). Accordingly the following exhibits have been incorporated into the record:

PSGG: Copy of Allen County Court of Common Pleas' appearance and execution docket.

PSHH: Respondent's Response to Petitioner's First Set of Request for Admissions.

PSII: Lima News Story, dated 23 January 1991.

(Docket #42). The Court again denied, as premature, petitioner's general request to further supplement the record with documents prior to filing his traverse. (Docket #48, at 2).

b. Respondent's Motion to Expand the Record

On 30 April 1999, respondent filed a motion to expand the record by filing, under seal, a transcript of statements

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[12] Petitioner originally filed, on 17 February 1999, Supplemental Record Volume I containing exhibits PSA-PSF as docket number 45. On 25 May 1999, the Court granted petitioner leave to file a corrected Supplemental Record Volume I as docket number 65.

made by Mr. Joseph and his co-defendant Mr. Bulerin in the presence of counsel during plea negotiations with the Allen County Prosecutor's Office. (Docket #55). Mr. Joseph filed both a brief in opposition and a cross motion to strike this document. (Docket #60). The Court denied respondent's motion to expand the record, thereby excluding the transcript from the record, but granted respondent leave to renew its motion if the Court grants an evidentiary hearing on relevant issues. (Docket #76).

c. Petitioner's Motion for Supplemental Discovery

On 12 May 1999, Mr. Joseph filed a motion for supplemental discovery seeking additional documents to support his grounds for relief. (Docket #61). While the Court denied, as overly broad, his request for "all of the witness statements, notes and memoranda that survive in the files of the Allen County Sheriff and the Allen County Prosecutor," it ordered the production and unsealing of the case file of witness statements and granted petitioner's motion with respect to the following documents:

- All notes and memoranda related to this case regarding William Forest from the prosecutor's file, including all documents created by the prosecutor;
- All notes, memoranda and records related to this case regarding Cara Wireman from the investigators and prosecutors; and,
- The log or case file sign-out sheet of this case maintained by the Allen County Sheriff's Office.

(Docket #76, at 14). In addition, the Court denied Mr. Joseph's supplemental discovery requests for all notes and records of interviews of Monte Stinebuck related to this case and all documents showing what the prosecutor claims to have produced in discovery to the defense or the trial court in this case. (Docket #76, at 14).

d. Petitioner's Third Motion to Supplement the Record

On 9 October 2001, Mr. Joseph filed his third motion to supplement the record. (Docket #87). The State has filed no response.

Pursuant to Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts, the following three documents submitted by Mr. Joseph with his third motion to supplement will be made a part of the record:

PSJJ: Transcript of the hypnotic interview with Cara Wireman

PSKK: Memorandum from Gary Hermon to Janet Hall regarding the admissibility of post-hypnotic testimony, dated 12 October 1990.

PSLL: Letter from Virginia Stinebuck to David Bowers at the Allen County Courthouse, dated 24 June 1991.

e. Petitioner's Motions for an Evidentiary Hearing.

On 15 April 1999, Mr. Joseph filed a motion seeking an evidentiary hearing on his first (defective indictment), fourth (Brady claim), and fifth (prosecutorial misconduct) grounds for relief. (Docket #54). While the Court denied Mr. Joseph's motion for an evidentiary hearing as to all three grounds, it provided that Mr. Joseph may renew his motion for an evidentiary hearing on his fourth and fifth grounds for relief at the close of supplemental discovery. (Docket #76, at 13-15).

On 9 October 2001, Mr. Joseph filed an amended motion for an evidentiary hearing on his first (defective indictment), fourth (Brady claim), and fifth (prosecutorial misconduct) grounds for relief. (Docket #88). The State filed a brief in

opposition on 22 October 2001. (Docket #90). The merits of this motion will be discussed below.

II. LAW AND ANALYSIS

A. The Applicability of AEDPA

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which amended 28 U.S.C. § 2254, was signed into law on 24 April 1996. In Lindh v. Murphy, 521 U.S. 320, 322-322, 336 (1997), the Supreme Court of the United States held that the provisions of AEDPA apply to habeas corpus petitions filed after that effective date. See also Woodford v. Garceau, 538 U.S. 202, 210 (2003); Barker v. Yukins, 199 F.3d 867, 871 (6th Cir. 1999) ("It is now well settled that AEDPA applies to all habeas petitions filed on or after its April 24, 1996 effective date.") As Mr. Joseph's petition was filed on 9 May 1998, AEDPA governs this Court's consideration of his petition.

B. AEDPA Standard of Review

AEDPA was enacted "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and 'to further the principles of comity, finality, and federalism.'" Woodford, 538 U.S. at 206 *(citing* Williams v. Taylor, 529 U.S. 72 362, 436 (2000)). In advancing such goals, Section 2254(d) places new constraints on "the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." Williams, 529 U.S. at 412. Section 2254(d) provides

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established

> Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). This legal standard establishes a multi-faceted analysis involving a consideration of both the state court's statement and/or application of federal law and its finding of facts.

With respect to Section 2254(d)(1), "clearly established federal law" refers to the holdings, as opposed to dicta, of the United States Supreme Court's decisions as of the time of the relevant state-court decision. Williams, 529 U.S. at 412; Barnes v. Elo, 231 F.3d 1025, 1028 (6th Cir. 2000).[13] The "contrary to" and "unreasonable application" clauses of the Section 2254(d)(1) are independent tests and must be analyzed separately. Williams, 529 U.S. at 412-13; Hill v. Hofbauer, 337 F.3d 706, 711 (6th Cir. 2003). A state court decision is "contrary to" federal law only "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Id. at 412-13.

Even if the state court identifies the "correct governing legal principle," a federal habeas court may still grant the petition if the state court makes an "unreasonable application" of "that principle to the facts of the particular

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[13] Although only Supreme Court case law is relevant under AEDPA in examining what federal law is "clearly established," Circuit Courts of Appeals' decisions "may be informative to the extent [they] have already reviewed and interpreted the relevant Supreme Court case law to determine whether a legal principle or right had been clearly established by the Supreme Court." Hill, 337 F.3d at 716.

state prisoner's case." Williams, 529 U.S. at 413. A state-court decision also involves an unreasonable application if it unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. Id. at 407; Hill, 337 F.3d at 711. In order for a state court's application of clearly established federal law to be unreasonable, the state court's decision must be more than incorrect or erroneous, rather it must be objectively unreasonable. Wiggins v. Smith, 539 U.S. 510, 520-21 (2003); Williams, 529 U.S. at 411; see also Simpson v. Jones, 238 F.3d 399, 405 (6th Cir. 2000). The reasonableness of the application of a particular legal principle depends in part on the specificity of the relevant rule. Yarborough v. Alvarado, 124 S. Ct. 2140, 2149 (2004). While the application of specific rules may be plainly correct or incorrect, courts may have more leeway in reasonably applying more general rules in the context of a particular case. Id.

As to the "unreasonable determination of the facts" clause in Section 2254(d)(2), the Supreme Court recently had the opportunity to apply the "fact" part of Section 2254(d)(2) in Wiggins v. Smith, 539 U.S. 510 (2003). In that case, the Court noted that a "clear factual error" such as making factual findings regarding the contents of social service records contrary to "clear and convincing evidence" presented by the defendant constitutes an "unreasonable determination of the facts in light of the evidence presented." Id. at 528-29. In other words, a state court's determination of facts is unreasonable if its findings conflict with clear and convincing evidence to the contrary. This analysis mirrors the "presumption of correctness" afforded factual determinations made by a state court which can only be overcome by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); see also Mitchell v. Mason, 325 F.3d 732, 737-38 (6th Cir. 2003); Clark v. O'Dea, 257 F.3d 498, 506 (6th Cir.

2001) ("regardless of whether we would reach a different conclusion were we reviewing the case de novo, the findings of the state court must be upheld unless there is clear and convincing evidence to the contrary").[14] This presumption only applies to basic, primary facts, and not to mixed questions of law and fact. Mitchell, 325 F.3d at 737-38 (ineffective assistance of counsel is mixed question of law and fact to which the unreasonable application prong of Section 2254(d)(1) applies).

By its express terms, however, Section 2254(d)'s constrained standard of review only applies to claims that were adjudicated on the merits in the state court proceeding. Clinkscale v. Carter, 375 F.3d 430, 436 (6th Cir. 2004). When a state court does not assess the merits of a petitioner's habeas claim, the deference due under AEDPA does not apply. Id.; Newton v. Million, 349 F.3d 873, 878 (6th Cir. 2003); Maples v. Stegall, 340 F.3d 433, 436-37 (6th Cir. 2003).[15] In such a case, the habeas court is not limited to deciding whether that court's decision was contrary to or involved an unreasonable application of clearly established federal law, but rather conducts a *de novo* review of the

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[14] Factual determinations made by a state appellate court after a review of the trial court record constitute a "hearing" where the parties were formally before the court, the petitioner was given an opportunity to be heard, and the petitioner's claim received plenary consideration. Id. at 546. See also, Mitchell v. Rees, 114 F.3d 571, 576 (6th Cir. 1997). Consequently, the deference to state court factual determinations required by § 2254 applies to the factual determinations of both trial and appellate courts. Id. at 546-547.

[15] Prior to Maples, the Sixth Circuit had applied the AEDPA standard of review to claims which had not been explicitly mentioned or analyzed by the state courts. See g&, Doan v. Briqano, 237 F.3d 722, 727 (6th Cir. 2001); Clifford v. Chandler, 333 F.3d 724, 730 (6th Cir. 2003). However, in Maples, the Sixth Circuit found that Doan and Clifford had been abrogated by the United States Supreme Court's decision in Wiqqins v. Smith, 539 U.S. 510, 534-38 (2003). 340 F.3d at 437.

claim. Maples, 340 F.3d at 436-37; Benge v. Johnson, 312 F. Supp. 2d 978, 987 (S.D. Ohio 2004).[16]

C. Prerequisites to Section 2254 Habeas Relief

Federal habeas petitioners face several threshold hurdles in their pursuit of relief under Section 2254. Specifically, they must exhaust their state remedies and satisfy or be excused from the one-year statute of limitations. See 28 U.S.C. §§ 2244(d)(1) and 2254(b) and (c). In this case, the State concedes that Mr. Joseph has exhausted available state court remedies by resorting to "all leveis of state appellate review and to all avenues for state post-conviction relief." (Docket #85, at 35-6).

The statute of limitations set forth in Section 2244(d)(1) is an affirmative defense not a jurisdictional prerequisite. Scott v. Collins, 286 F.3d 923, 927 (6th Cir. 2002). The party asserting the statute as a defense bears the burden of demonstrating that the statute has run. Griffin v. Rogers, 308 F.3d 647, 653 (6th Cir. 2002). A party's failure to raise the statute of limitations' defense in the first responsive pleading waives the defense. Scott, 286 F.3d at 927-28. Since the State has never raised a statute of limitations' defense, this Court need not consider this issue any further.

D. Petitioner Joseph's Motion for an Evidentiary Hearing

In his amended motion for an evidentiary hearing, Mr. Joseph seeks an opportunity to present evidence related to his first, fourth, and fifth grounds for relief. (Docket #88). The State has filed a memorandum in opposition to Mr. Joseph's request for an evidentiary hearing. (Docket #90). After reviewing the legal standard for determining whether an

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[16] To the extent that the state court did not address a claim due to petitioner's failure to raise it on direct review, the claim may have been procedurally defaulted. O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999); Maples v. Stegall, 340 F.3d 433,437-38 (6th Cir. 2003).

evidentiary hearing is warranted, the Court examines Mr. Joseph's request with respect to all three grounds for relief.

1. Standard for an Evidentiary Hearing

AEDPA expressly limits the power of federal courts to grant an evidentiary hearing when the petitioner has failed to develop the factual basis of a claim in state court proceedings. 28 U.S.C. § 2254(e)(2). Under such circumstances, the court shall only hold an evidentiary hearing if the petitioner shows that:

> (A) the claim relies on -
>
> > (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). In Williams v. Taylor, the Supreme Court explained that "a failure to develop the factual basis of a claim" only occurs if there is "a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." 529 U.S. 420, 432 (2000). The question is "whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." Id. at 435. "Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." Id. at 437. If, on the other hand, there has been no lack of diligence at the relevant stages in

the state proceedings, then the petitioner is excused from showing compliance with the balance of the Section 2254(e)(2)'s requirements. Id.; Thompson v. Bell, 315 F.3d 566, 594 (6th Cir. 2003). In this case, there has been no suggestion of lack of diligence on the part of Mr. Joseph and so Section 2254's requirements are inapplicable.

Given the inapplicability of Section 2254(e)(2), this Court maintains discretion to order an evidentiary hearing to develop, when necessary, the factual record. Williams, 529 U.S. at 433 and 437; McAdoo v. Elo, 365 F.3d 487,500 (6th Cir. 2004); Bowling v. Parker, 344 F.3d 487, 513 (6th Cir. 2003) (the inapplicability of Section 2254(e)(2) does not automatically entitle a petitioner to an evidentiary hearing); Moss v. Hofbauer, 286 F.3d 851, 859 (6th Cir. 2002). Under such circumstances, a habeas petitioner generally is entitled to an evidentiary hearing in federal court if (1) the petition alleges sufficient specific facts that, if true, would entitle the petitioner to relief, (2) relevant facts are in dispute and (3) the state courts did not hold a full and fair evidentiary hearing. Sawyer v. Hofbauer, 299 F.3d 605, 610-11 (6th Cir. 2002); Stanford v. Parker, 266 F.3d 442, 459 (6th Cir. 2001). However, bald assertions and conclusory allegations do not provide sufficient grounds to warrant an evidentiary hearing. Bowling, 344 F.3d at 512. A hearing need not be held in the absence of a genuine issue of material fact (i.e., the relevant facts are well-developed or not disputed). Thompson, 315 F.3d at 595. Moreover, a hearing is not necessary if the facts the petitioner seeks to present are "clearly established in the record" and would be cumulative. Sawyer v. Hofbauer, 299 F.3d 605, 612 (6th Cir. 2002); Lefever v. Money, 225 F.3d 659, 2000 WL 977306, *8 (6th Cir. 2000). Put another way, if a hearing would not develop material facts relevant to a petitioner's federal constitutional claims, an evidentiary hearing is not required. McDonald v. Johnson, 139 F.3d 1056, 1060 (5th Cir. 1998).

2. Application

In reviewing Mr. Joseph's amended motion, the Court examines the evidence Mr. Joseph contends will likely be offered at an evidentiary hearing to support his various grounds for relief.

a. First Ground for Relief

To support his first ground for relief that the defective indictment violated his fundamental due process right to notice of the crime charged, Mr. Joseph seeks an evidentiary hearing to present evidence that the case was in fact tried under the erroneous charge set forth in the indictment. (Docket #88, at 5-6). This Court has already denied an evidentiary hearing to further explore this issue because both parties conceded that an evidentiary hearing was unnecessary on this claim and that it could be decided based on the existing record. (Docket #76, at 13). Even in his recent motion, Mr. Joseph admits that a review of the state record may be sufficient in deciding this claim. (Docket #88, at 6 nA). Because this Court finds the facts related to the defective indictment already well developed in the original state court record and the expanded federal habeas record, an evidentiary hearing on this ground would be cumulative and would not develop new material facts relevant to Mr. Joseph's claim.

b. Fourth Ground for Relief

In support of his fourth ground for relief that the State withheld material exculpatory evidence, Mr. Joseph seeks to introduce evidence of the following:

i. Whether William Forest's 4 July 1990 statement was produced to Mr. Joseph.

ii. Whether Monte Stinebuck believed that he would be paid for his cooperation.

iii. Why Cara Wireman was subjected to an undisclosed hypnotic interview.

iv. The State's spoliation of evidence.

(Docket #88, at 7-9).

i. William Forest's 4 July 1990 Statement

Mr. Joseph contends that William Forest's 4 July 1990 statement was never produced to him. However, his assertion is belied by the record which establishes that his trial counsel, Mr. Novak, was aware of the 4 July 1990 statement and questioned Mr. Forest about that statement, even quoting a specific passage from it. (Tr. 1655, 1661-62, and 1754). Accordingly, the production of the 4 July 1990 statement is not seriously in dispute and an evidentiary hearing on this issue is unnecessary.

ii. Monte Stinebuck

Mr. Joseph argues that an evidentiary hearing is necessary to determine whether Monte Stinebuck held a reasonable belief that he would be paid for his cooperation. At trial, Monte Stinebuck testified that on 28 June 1990 he saw Mr. Joseph, Mr. Bulerin, Mr. Forest, and Bill Michael at the Buff and Wax, a detail shop related to Frank's Car Wash. (Tr. 1532-34). He then proceeded to offer testimony about the hauling of trash from the car wash to Joseph's Sand and Gravel Pit. (Tr. 1536-39). He also testified that his former wife contacted the police with this information. (Tr. 1540-42).

The sole basis for Mr. Joseph's assertion that Mr. Stinebuck may have expected compensation for his cooperation is a letter written by Virginia Stinebuck, Monte's mother, on 24 June 1991 to the Allen County Courthouse inquiring about the existence and expenditure of reward money related to Mr. Joseph and Mr. Bulerin's arrest and conviction. (Ex. PSLL). In her letter, Ms. Stinebuck stated, among other things, that:

> At the time my husband was told by someone at the sheriff's department that Monte was eligible for the reward that was being offered. It was around $9600. They did not say that he would get it, because they had nothing to do with it, but that if he would get it it would be from 2 months to a year. It will be a year next week and we have not heard a thing about the reward.

(Ex. PSLL). This letter does not provide a sufficient justification for further inquiry into whether or not Mr. Stinebuck expected a reward as it does not support the implication that Mr. Stinebuck expected to be paid for his cooperation. Even if Mr. Stinebuck eventually expected to be eligible for a reward, there is absolutely no evidence suggesting that his testimony was affected by that expectation. When Mr. Stinebuck initially provided information to the Sheriffs's department, he testified that he was not even sure that it was relevant. (Tr. 1541-42). In short, Mr. Joseph has failed to present a colorable basis for a constitutional violation related to Mr. Stinebuck's testimony.

iii. Cara Wireman

Mr. Joseph contends that an evidentiary hearing is necessary to determine why Cara Wireman was "subjected to an undisclosed hypnotic interview." (Docket #88, at 7). As Mr. Joseph does not contend that Ms. Wireman's testimony was affected by the hypnosis session and provides no justification for the need for this inquiry, the Court finds an evidentiary hearing on this topic unwarranted.

iv. Spoliation of Evidence

Mr. Joseph also contends that an evidentiary hearing is necessary to determine what happened to the tape recording of Mr. Forest's 4 July 1990 interview, rough notes and reports of Mr. Forest's other statements, the knife offered as evidence at trial, and Mr. Forest's application to the Allen

County Sheriff's Office. Having already granted leave to conduct substantial discovery into these issues and expanding the record to incorporate additional evidence, the Court has obviated the need for an evidentiary hearing into these matters. Mr. Joseph does not suggest what additional facts, if any, he might introduce into evidence at an evidentiary hearing on the State's purported destruction of evidence. As the existing record is sufficient, an evidentiary hearing is unnecessary.

c. Fifth Ground for Relief

In support of his fifth ground of relief regarding prosecutorial misconduct, Mr. Joseph seeks to explore whether the State "'knowingly' presented false testimony by William Forest." (Docket #88, at 5). Mr. Joseph has already conducted extensive discovery on this issue, which included depositions of Mr. Forest, numerous law enforcement officials, and Mr. Bowers, the Allen County prosecutor involved in Mr. Joseph's case. (Ex. PSA-PSG). During the depositions of Mr. Bowers and Mr. Forest in particular, Mr. Joseph had the opportunity to explore whether the State knowingly presented false testimony by Mr. Forest. All such evidence has been incorporated into the record. Since Mr. Joseph has failed to point to any evidence suggesting that the State suborned perjury from Mr. Forest, he is not entitled to an evidentiary hearing on this matter.

d. Conclusion

Because this Court's examination of the evidence Mr. Joseph claims he would likely offer and the issues he would likely explore at an evidentiary hearing demonstrate that a hearing is not warranted, Mr. Joseph's motion for an evidentiary hearing is denied. The Court will analyze his grounds for relief based on the state court record, as expanded by this Court to include evidence obtained during federal discovery.

E. Procedural Default

Before examining the merits of Mr. Joseph's claims, the Court must address the State's contention that part or all of his first, second, eighth, and eighteenth grounds for relief are procedurally defaulted and therefore barred from federal habeas corpus review.

1. General Law of Procedural Default

In general, a federal court may not consider "contentions of general law which are not resolved on the merits in the state proceeding due to petitioner's failure to raise them as required by state procedure." Wainwright v. Sykes, 433 U.S. 72, 87 (1977). If a "state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750 (1991). To be independent, a state procedural rule and the state courts' application of it "must rely in no part on federal law." Fautenberry v. Mitchell, 2001 WL 1763438, * 24 (S.D. Ohio) *(citing* Coleman, 501 U.S. at 732-733). To be adequate, a state procedural rule must be "firmly established and regularly followed" by the state courts at the time it was applied. Ford v. Georgia, 498 U.S. 411, 423-24 (1991); Williams v. Coyle, 260 F.3d at 693. If a petitioner fails to fairly present any federal habeas claims to the state courts but has no remaining state remedies, then the petitioner has procedurally defaulted those claims. O'Sullivan, 526 U.S. at 848; Rust v. Zent, 17 F.3d at 160.

In Maupin v. Smith, 785 F.2d 135 (6th Cir. 1986), the Sixth Circuit outlined the analysis to be followed when the State argues that a habeas claim is defaulted because of a prisoner's failure to observe a state procedural rule:

> First, the federal court must determine whether there is a state procedural rule that is applicable to the petitioner's claim and whether the petitioner failed to comply with that rule. Second, the federal court must determine whether the state courts actually enforced the state procedural sanction -that is, whether the state courts actually based their decisions on the procedural rule. Third, the federal court must decide whether the state procedural rule is an adequate and independent state ground on which the state can rely to foreclose federal review of a federal constitutional claim.

Williams v. Coyle, 260 F.3d 684, 693 (6th Cir. 2001).

In determining whether the Maupin factors are met, the federal court looks to the last explained state court judgment. Combs, 205 F .3d at 275; Ylst v. Nunnemaker, 501 U.S. 797, 805 (1991). If the last reasoned opinion on a claim explicitly imposed a procedural default, there is a presumption, which can be rebutted with strong evidence to the contrary, "that a later decision rejecting the claim did not silently disregard the bar and consider the merits." Ylst, 501 U.S at 803. "If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review." Id. at 801.

If the three Maupin factors are met, the claim is procedurally defaulted. However, the federal court may excuse the default and consider the claim on the merits if the petitioner demonstrates that (1) there was cause for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error or (2) a fundamental miscarriage of justice would result from a bar on federal review. Maupin, 785 F.2d at 138; Hutchison v. Bell, 303 F.3d 720, 735 (6th Cir. 2002); Combs, 205 F.3d at 274-275.

A petitioner can establish cause in two ways. First, a petitioner may "show that some objective factor external to

the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986); Mohn v. Bock, 208 F. Supp.2d 796, 801 (E.D. Mich. 2002). Objective impediments include an unavailable claim or interference by officials that made compliance impracticable. Murray, 477 U.S. at 488; Mohn, 208 F. Supp.2d at 801. Second, constitutionally ineffective assistance of counsel constitutes cause. Murray, 477 U.S. at 488-489; Mohn, 208 F. Supp. 2d at 801,804; Rust v. Zent, 17 F.3d 155,161 (6th Cir. 1994).

If a petitioner asserts ineffective assistance of counsel as cause for a default, that ineffective assistance claim must itself be presented to the state courts as an independent claim before it may be used to establish cause. Murray v. Carrier, 477 U.S. 478,488-489 (1986). If the ineffective assistance claim is not presented to the state courts in the manner that state law requires, that claim is itself procedurally defaulted and can only be used as cause for the underlying defaulted claim if the petitioner demonstrates cause and prejudice with respect to the ineffective assistance claim. Edwards v. Carpenter, 529 U.S. 446, 452, 453 (2000).

To establish prejudice, a petitioner must demonstrate that the constitutional error "worked to his actual and substantial disadvantage." Perkins v. LeCureux, 58 F.3d 214, 219 (6th Cir. 1995), quoting United States v. Frady, 456 U.S. 152, 170 (1982). "When a petitioner fails to establish cause to excuse a procedural default, a court does not need to address the issue of prejudice." Simpson v. Jones, 238 F.3d 399, 409 (6th Cir. 2000).

Because the cause and prejudice standard is not a perfect safeguard against fundamental miscarriages of justice, the United States Supreme Court has recognized a narrow exception to the cause requirement where a constitutional violation has "probably resulted" in the conviction of one who is "actually innocent" of the substantive offense. Dretke

v. Haley, 124 S. Ct. 1847 *(citing* Murray v. Carrier, 477 U.S. 478, 495-96 (1985)). When the Supreme Court extended this exception to claims of capital sentencing error, it limited the exception in the capital sentencing context to cases in which the petitioner could show "by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." Id. *(quoting* Sawyer v. Whitley, 505 U.S. 333, 336 (1992).

2. Specific Grounds for Relief Involving Procedural Default

a. First Ground for Relief

In his first ground for relief, Mr. Joseph alleges that the indictment failed to contain a valid specification to allow for the imposition of the death penalty thereby violating his due process right to notice of the crime charged. In addressing Mr. Joseph's defective-indictment claim on direct appeal, the Ohio Supreme Court began by stating that:

> [Mr. Joseph] never challenged the sufficiency of the indictment at any time before or during his trial. An appellate court need not consider an error which was not called to the attention of the trial court at a time when such error could have been avoided or corrected by the trial court.

73 Ohio St. 3d at 455. Accordingly, the State argues that Mr. Joseph's defective indictment claim was procedurally defaulted because of the application of the contemporaneous objection rule which provides that Ohio appellate courts need not consider alleged errors which the complaining party "could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." State v. Williams, 51 Ohio St. 2d 112, syllabus ¶1 (1977). While Mr. Joseph raises several arguments attacking the State's position that his defective

indictment claim was procedurally defaulted, this Court focuses on the applicability and the adequacy of the contemporaneous objection rule in foreclosing federal review of a federal constitutional claim in the context of defective indictments.[17]

Even though the Supreme Court of Ohio applied the contemporaneous objection rule in this case, it does not necessarily follow that such an application is adequate to bar federal habeas corpus review. A state procedural rule is inadequate and will not foreclose federal habeas review unless it was "firmly established and regularly followed" by the state courts at the time it was applied. Lee v. Kemna, 534 U.S. 362, 375 (2002); Ford v. Georgia, 498 U.S. 411, 423-24 (1991); James v. Kentucky, 466 U.S. 341, 348-49 (1984); Williams v. Coyle, 260 F.3d at 693. Moreover, even when a state procedural rule is generally sound, there are exceptional cases in which the "exorbitant application" of the rule "renders the state ground inadequate to stop consideration of a federal question." Lee, 534 U.S. at 375. While numerous courts, including the U.S. Supreme Court, have concluded

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[17] Mr. Joseph argues that the Ohio Supreme Court should have applied Ohio R. Crim. P. 12(8)(2) instead of the contemporaneous objection rule as articulated in State v. Williams. Rule 12(8)(2) provides defenses and objections based on defects in the indictment must be raised before trial unless the objections or defenses relate to the indictments' "failure to show jurisdiction in the court or to charge an offense," as such "objections shall be noticed by the court at any time during the pendency of the proceeding." Since the Ohio Supreme Court made no reference to Rule 12(8)(2), this Court finds that it did not apply that procedural rule and accordingly does not analyze the alleged procedural default within that context.

that Ohio's contemporaneous objection rule generally constitutes an adequate and independent state ground that bars federal habeas review absent a showing of cause and prejudice, Engle v. Isaac, 456 U.S. 107, 124-29 (1982); Williams v. Bagley, 380 F.3d 932, 968 (6th Cir. 2004); Scott v. Mitchell, 209 F. 3d 854, 867-68 (6th Cir.2000); Hinkle v. Randle, 271 F.3d 239, 244 (6th Cir. 2001), none of those cases involved a defective indictment. Ohio courts have "consistently held that an indictment or affidavit must set forth all the essential elements of the crime charged or it is invalid." State v. Burgun, 49 Ohio App.2d 112, 118 (1976). Moreover, numerical designation of a statute under which a defendant is charged will not cure [an indictment] which is defective due to a failure to charge all the essential elements of the crime." Id. at 119. In fact, Ohio courts have reversed convictions where an individual was charged with one crime and convicted of another or where the charging instrument failed to set forth all the essential elements of the crime. Headley, 6 Ohio St. 3d at 479; State v. Neese, 114 Ohio App. 3d 93, 95 (1996); Statey. Kinzer, 1991 WL214360, *4 (Ohio App. Oct. 21, 1991); State v. Keplinger, 2003 WL 21497117, *13 (Ohio App. Jun 30, 2003).

In the context of aggravated murder, Ohio law only provides for the imposition of the death penalty if the indictment contains one of the specifications enumerated in Section 2929.04(A). Ullman v. Seiter, 18 Ohio St.3d 59, 60 (1985). If the indictment fails to include a death penalty specification, a death sentence is precluded and the trial court, following a verdict of guilty on the aggravated murder charge, "shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment . . . " O.R.C. § 2929.03(A). Cf. Dilley, 47 Ohio St. 3d at 22-23 (explaining, under a different specification scheme, the impact of failing to follow the mandatory procedure of including the specification in the indictment). Given the unique statutory scheme of Ohio's death penalty as well as

case law related to defective indictments generally, Ohio had no firmly established and regularly applied procedural rule precluding defendants sentenced to death from attacking an indictment for failing to include a death penalty specification even though they failed to object to it at trial. While the Ohio Supreme Court applied, in this case, the contemporaneous objection rule, its application of the rule in this context is inadequate to serve as a procedural bar precluding federal habeas review of his claim.[18]

Even if the contemporaneous objection rule was generally adequate to bar federal due process claims related to insufficient notice of the crimes charged, the application of such a rule in this case would be exorbitant given the particular circumstances of this case. (See Merits Analysis of Mr. Joseph's first, second, eighth and nineteenth grounds for relief).

b. Second Ground for Relief

In his second ground for relief, Mr. Joseph alleges that the trial court incorrectly instructed the jury, at both the guilt/innocence and penalty phases of his trial, about the aggravating circumstance necessary to convict Mr. Joseph of capital murder and sentence him to death. The Ohio Supreme Court, on direct appeal, concluded that Mr. Joseph's argument that his conviction must be reversed because the trial judge read an "imperfect specification" to the jury at the beginning of the penalty phase was "waived absent plain error" because no objections were raised at trial. 73 Ohio St. 3d at 460-61. While the Ohio Supreme Court did not specifically address the guilt phase instruction,

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[18] Even if the contemporaneous objection rule was generally adequate to bar federal due process claims related to insufficient notice of the crimes charged, the application of such a rule in this case would be exorbitant given the particular circumstances of this case. (See Merits Analysis of Mr. Joseph's first, second, eighth and nineteenth grounds for relief).

the Court of Appeals, citing Ohio R. Crim. P. 30(A) and State v. Spirko, 59 Ohio St. 3d 1, 34 (1991), noted that Mr. Joseph's failure to object to the instruction at trial precludes him from assigning error to the instruction absent plain error. 1993 WL 531858, at *9 (Ohio. App. Ct.). Thus, the State argues that Mr. Joseph's erroneous instruction claim was procedurally defaulted because of the application of the contemporaneous objection rule.

Mr. Joseph does not seriously contest the procedural default of his erroneous instruction claim, but rather argues that such default should be excused because his trial counsel was ineffective and because he suffered prejudice from the alleged constitutional error. Wainwriaht, 433 U.S. at 87; Coleman v. Thompson, 501 U.S. 722, 753-54 (1991); Lucas v. O'Dea, 179 F.3d 412, 418 (6th Cir. 1999). Constitutionally ineffective assistance of counsel may constitute cause to excuse a procedural default. Lucas, 179 F.3d at 418. In Strickland v. Washinaton, the United States Supreme Court explained that the

> [B]enchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [or capital sentencing proceeding] cannot be relied on as having produced a just result.

466 U.S. 668, 686-687 (1984). In establishing ineffective assistance of counsel, the defendant must show that his counsel's performance was deficient and prejudicial such that the errors he committed "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. To demonstrate that counsel's performance was deficient, the defendant must show that "counsel's representation fell below an objective standard of reasonableness . . . [under] prevailing professional norms." Id. at 687-688. In assessing the counsel's performance, courts must consider the specific acts or omissions of counsel and

determine whether they were "outside the wide range of professionally competent assistance." Id. at 689-90. Failure to object to an erroneous jury instruction may constitute such deficient performance. Lucas, 179 F.3d at 418 *(citing* Gray v. Lynn, 6 F.3d 265, 269 (5th Cir.1993)). To establish "prejudice" under Strickland, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

At both the guilt/innocence and penalty phases, Mr. Joseph's trial counsel failed to object to an instruction on the death penalty specification which incorrectly described the applicable aggravating circumstance. Rather than instructing the jury that it must find that Mr. Joseph was the principal offender in the commission of the aggravated murder, as required by O.R.C. § 2929.04, the trial court told the jury that the aggravating circumstance required a finding beyond a reasonable doubt that "the offenders were the principal offenders in the commission of the kidnapping." (Tr. 2066-67; Mitigation Tr. 2526). The failure of Mr. Joseph's counsel to identify and object to these erroneous instructions regarding the aggravating circumstance fell below an objective standard of reasonableness under the prevailing norms of the profession. See e.g. Lucas, 179 F.3d at 418; Everett v. Beard, 290 F.3d 500, 516 (3rd Cir. 2002). (Ex. FJ, Kelleher Aff. at, ¶ 8.P.) A reasonably competent lawyer must carefully scrutinize jury instructions to make sure that the instructions require proof beyond a reasonable doubt of each element of a crime. Everett, 290 F.3d at 510. Trial counsel's failure to do so was symptomatic of their basic misunderstanding of the elements of this case beginning with the flawed indictment up until the jury instructions at both the guilt/innocence and penalty phases.

Prejudice was manifest in the failure of trial counsel to object to these erroneous instructions as these instructions may have confused the jurors such that they sentenced Mr.

Joseph to death based upon an improper aggravating circumstance. Even if the instructions were sufficiently clear so that the jury found the proper aggravating circumstance, these instructions were still prejudicial because they amounted to a improper amendment to the indictment, materially altering the charging terms of the indictment. Lucas, 179 F.3d 412,417 (6th Cir. 1999). A more complete examination of the prejudicial nature of the erroneous instructions is set forth in the Court's discussion of the merits of Mr. Joseph's first, second, eighth, and nineteenth grounds for relief. It suffices here to conclude that the deficient performance of Mr. Joseph's trial counsel rendered ineffective the adversarial process and uncertain the justness of the result.

Having established cause by virtue of his counsel's ineffective assistance, Mr. Joseph has simultaneously established prejudice to excuse his default since prejudice is one of the elements of a claim of ineffective assistance. Zuern v. Tate, 101 F. Supp. 2d 948, 961 (S.D. Ohio 2000). Thus, the procedural default of Mr. Joseph's erroneous instruction claim, if any, is excused and the merits of that claim will be considered in more detail below.

c. Eighth Ground for Relief

In his eighth ground for relief, Mr. Joseph alleges that he was denied his right to the effective assistance of counsel. Specifically, Mr. Joseph contends that his counsel was ineffective by failing to object to the incorrect death penalty specification, by their misconduct at voir dire, and by their incompetent representation during both the guilt/innocence and penalty phases of the trial. In this case, Mr. Joseph raised several arguments related to his ineffective assistance of counsel claim on direct appeal both in the Ohio Court of Appeals and the Ohio Supreme Court and during post-conviction proceedings in state court.

While not arguing that this entire claim has been procedurally defaulted, the State asserts that many "sub-claims" regarding ineffective assistance of counsel during the guilt/innocence and penalty phases of the trial were procedurally defaulted by the application of Ohio's res judicata doctrine as established by State v. Perry. 10 Ohio St. 2d 175 (1967). Specifically, the State argues that Mr. Joseph's failure to raise certain specific arguments related to the ineffective assistance of counsel on direct appeal caused them to be procedurally defaulted.

Mr. Joseph's ineffective assistance of counsel claims can be divided into three general categories, claims based on factual bases raised for the first time: 1) on direct appeal; 2) during post-conviction proceedings in state court; and 3) in his federal habeas corpus petition. The Court identifies and addresses these three categories of claims separately.

i. Claims Raised on Direct Appeal

On direct appeal, Mr. Joseph raised an ineffective assistance of counsel claim based on the following alleged factual bases, which he continues to pursue in his federal habeas corpus petition:

- Trial counsel's failure to recognize the invalid capital specification in the indictment and failure to object to it at anytime. (Ex. EK, at 100).
- Trial counsel's voir dire errors. (Ex. EK, at 101-102).
- Trial counsel's failure to object at both the guilt/innocence and penalty phases of the trial as to the erroneous instructions regarding the capital specification. (Ex. EK, at 103).
- Trial counsel's disparaging remarks about his client in front of the court and the prosecutor. (Ex. EK, at 104).

- Trial counsel allowed the State to divulge claimed details concerning plea negotiations to the judge. (Ex. EK, at 104).

As the bases for these ineffective assistance of counsel claims were fairly presented to the state courts on direct appeal, Mr. Joseph's habeas ineffective assistance of counsel claim, to the extent that it relies on these bases, has not been procedurally defaulted. The State does not argue otherwise.

ii. Claims Raised for the First Time During Post-Conviction Proceedings in State Court

In his petition for post-conviction relief in state court, Mr. Joseph presented one new factual basis to support his ineffective assistance of counsel claim:

- Trial counsel's failure to prepare for the penalty phase and adequately explain the impact of Mr. Joseph's learning disability. (Ex. FJ at 11, ¶¶40-44).

As noted above, the State argues that Mr. Joseph procedurally defaulted this "sub-claim" due to the application of the res judicata doctrine.

The res judicata doctrine provides that constitutional issues cannot be considered in Ohio post-conviction proceedings where they have already been or could have been fully litigated by a prisoner represented by counsel on direct appeal. 10 Ohio St.2d 175, 176 (1967). With respect to ineffective assistance of counsel, Ohio courts apply the res judicata doctrine in post-conviction proceedings when the defendant is represented by new counsel upon direct review, fails to raise the issue of competent trial counsel, and such issue "could fairly have been determined without resort to evidence dehors the record." State v. Cole, 2 Ohio St.3d 112, 112 (1982).

While the Ohio Supreme Court did not specifically address Mr. Joseph's ineffective assistance claims in its

written opinion on direct appeal, it affirmed the Ohio Court of Appeals which concluded that "[o]n the whole, [Mr. Joseph's] trial counsel functioned as 'counsel guaranteed by the Sixth Amendment.'" (Ex. EP at 61). In its postconviction ruling, the Ohio Court of Appeals stated that "[t]he Supreme Court of Ohio has already addressed this issue in the original appeal and found trial counsel's representation to be appropriate" and thus held that, since the ineffective assistance of counsel claim "was raised in the original appeal, further litigation is barred by the doctrine of res judicata." (Ex. FX, at 5-6). The Ohio Court of Appeals specifically concluded that res judicata barred review of Mr. Joseph's arguments that his counsel was ineffective for failing to offer additional mitigation evidence during the penalty phase. (Ex. FX, at 7). Because Mr. Joseph fails to demonstrate, or even argue, cause and prejudice for failing to present this claim on direct appeal, his ineffective assistance of counsel claim based on trial counsel's failure to prepare for the penalty phase and adequately develop mitigation evidence is procedurally defaulted.

iii. Claims Raised for the First Time in Mr. Joseph's Federal Habeas Corpus Petition

In his federal habeas petition, Mr. Joseph, raises, for the first time, several new factual bases for his ineffective assistance of counsel claim related to the guilt/innocence and penalty phases of his trial:

- Trial counsel was generally "unfit to mount an adequate defense," as demonstrated by his physical collapse early in the trial.
- Trial counsel failed to properly cross-examine prosecution witnesses, especially Mr. Forest.
- Trial counsel committed numerous errors during closing argument, including raising contradictory arguments, misconstruing the State's manslaughter

provisions, reinforcing the State's theories of the case, and suggesting his client's guilt.

- During the penalty phase, trial counsel failed to rebut or object to the State's suggestions to the jury that proper mitigating factors included only what excused criminal responsibility for kidnapping.

- During the penalty phase, trial counsel put on a black ninja mask and proceeded to try to make a final plea for Mr. Joseph's life.

As with Mr. Joseph's claims raised for the first time in state post-conviction proceedings, the State argues that Ohio's *res judicata* doctrine bars claims raised for the first time in a federal habeas petition. Such an argument is misplaced, however, as the procedural rule identified by the State, the *res judicata* doctrine, was never actually enforced with respect to Mr. Joseph's ineffective assistance arguments described above. In fact, these particular arguments were never raised on direct appeal or in the state collateral proceedings. If Mr. Joseph had raised these arguments in the collateral proceeding, it is possible the Ohio Court of Appeals would have applied the *res judicata* doctrine to bar them. Since he did not, the Ohio Court of Appeals never addressed the issue in the post-conviction proceedings and *res judicata* is not the appropriate procedural rule.

However, Mr. Joseph's failure to present certain factual bases for his ineffective assistance of counsel claim to the state courts does not entitle him to federal habeas review of those claims. On the contrary, by failing to properly present claims to state courts when state-court remedies were still available, a habeas petitioner procedurally defaults those claims and they may not be considered by the federal court on habeas review absent a demonstration of cause and prejudice. O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999); Seymour v. Walker, 224 F .3d 542, 549-50 (6th Cir. 2000);

Maples v. Stegall, 340 F.3d 433, 437-38 (6th Cir. 2003).[19] The requirement that a habeas petitioner must have fairly presented to the state courts the substance of his federal habeas corpus claim applies both to entirely new legal claims and new factual bases for relief. Alley v. Bell, 307 F.3d 380, 386 (6th Cir. 2002). Thus, while Mr. Joseph brought an ineffective assistance of counsel claim before the Ohio Supreme Court, his claim is procedurally defaulted to the extent that it relies on different factual bases not fairly presented to the state court. Cf Taylor v. Mitchell, 296 F. Supp.2d 784,815 (N.D. Ohio 2003) (concluding that, though petitioner pursued a prosecutorial misconduct claim in state court, petitioner procedurally defaulted prosecutorial misconduct claims based on prosecutorial comments not presented to the state court).

In his habeas petition, Mr. Joseph argues, for the first time, that his counsel was ineffective because of physical infirmities, inadequate cross-examination, an ineffective closing argument, and specific errors committed during the penalty phase. Because the substance of these arguments was not fairly presented to the state courts, they are procedurally defaulted absent a showing of cause and prejudice. Mr. Joseph only attempts to demonstrate cause and prejudice with respect to his failure to raise an ineffective assistance of counsel claim based on trial counsel's allegedly erroneous and prejudicial closing argument. For cause, Mr. Joseph cursorily argues that his appellate counsel was itself ineffective in failing to catch the trial counsel's plain error in

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[19] In this context, exhaustion and procedural default are somewhat similar. However, exhaustion, unlike procedural default, is only a problem if the "state still provides a remedy for the habeas petitioner to pursue." Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994). Where, as here, no further state remedy exists, the failure to present a claim in state court is examined for procedural default. Id.

closing argument. Failure of appellate counsel to raise an issue can amount to constitutionally ineffective assistance and serve as cause to otherwise excuse procedural default of an ineffective assistance of trial counsel claim. McFarland v. Yukins, 356 F.3d 688, 710-12 (6th Cir. 2004). However, counsel has no obligation to raise every possible issue and the decision of which issues to pursue is ordinarily entrusted to counsel's professional judgment. Id. Here Mr. Joseph's appellate counsel raised 32 assignments of error on appeal and asserted numerous bases to demonstrate the ineffectiveness of his trial counsel. Their decision not to include this single basis to support Mr. Joseph's ineffective assistance of trial counsel claim does not fall below an objective standard of reasonableness under prevailing professional norms as required by Strickland v. Washington.

In addition, Mr. Joseph's failure to file a delayed claim of ineffective assistance of appellate counsel in an application for delayed reconsideration, pursuant to Ohio App. R. 26 and State v. Murnahan, 63 Ohio St.3d 60, syllabus ¶¶ 2-3 (1992), in the court of appeals where the alleged error took place may constitute a failure to exhaust this claim. Murray v. Carrier, 477 U.S. 478, 488-489 (1986); Rockwell v. Yukins, 217 F.3d 421,42324 (6th Cir. 2000); *but see* Adams v. Holland, 330 F.3d 398 (6th Cir. 2003) (explaining that "when remedies are taken outside of the normal criminal review process, those remedies become 'extraordinary' technically available to the litigant but not required to be exhausted.") However, "the mere presence of this unexhausted claim" does not require dismissal of Mr. Joseph's petition because he has suffered no prejudice from the procedural default. Ewing v. McMackin, 799 F.2d 1143, 1149-50 n.12 (6th Cir. 1986).[20]

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[20] If Mr. Joseph had filed a Rule 26 motion and it had been denied for failure to show good cause for filing after the 90-day period allowed, his claim would be exhausted, but may nonetheless be procedurally

Accordingly, Mr. Joseph has procedurally defaulted his ineffective assistance of trial counsel "sub-claims" raised for the first time in his federal habeas petition.[21]

d. Eighteenth Ground for Relief

In his eighteenth ground for relief, Mr. Joseph argues that his due process rights were violated when the trial court failed to permit defense counsel to participate in the *in camera* inspection of witness statements as provided by Ohio R. Crim. P. 16(8)(1)(g).[22] In ruling on a motion filed by defense counsel, the trial court ordered the State, pursuant to

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defaulted. Edwards v. Carpenter, 529 U.S. 446, 449, 451-53 (2000); Buell v. Mitchell; 274 F.3d 337, 349 (6th Cir. 2001) (finding no procedural default); Coleman v. Mitchell, 244 F.3d 533,539-40 (6th Cir. 2001) (finding procedural default).

[21] Though the confusion evident in the trial counsel's closing argument may not serve as an independent basis for ineffective assistance of counsel, it may be relevant to the prejudicial effect of other alleged constitutional deficiencies.

[22] Rule 16(8)(1)(g) of the Ohio Rules of Criminal Procedure provides in pertinent part:

Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

> If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.
>
> If the court determines that inconsistencies do not exist the statement shall not be given to the defense attorney and he shall not be permitted to cross-examine or comment thereon.
>
> Whenever the defense attorney is not given the entire statement, it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

Rule 16, to turn over copies of witness statements for any witness who testified in the State's case. (Tr. 1320-21). In this case, the State turned over six witness statements to the court: Cara Wireman, Michelle Rumer, William Forest, Steve Heuerman, Monty Stinebuck, and Mary Joseph. (Tr. 1406-1407). The trial court then reviewed each witness statement. (Tr. 1196, 1306, 1544).[23] The court turned over Ms. Wireman's witness statement to defense counsel because portions of that statement were "arguably exculpatory" as well as Mr. Forest's forty-two page statement because it contained "minor discrepancies and/or exculpatory evidence." (Tr. 1196-98 and 1637-45). With respect to the remaining statements, the court found no inconsistencies and so did not turn over the statements. (Tr. 1306, 1544).

On direct appeal to the Ohio Court of Appeals, Mr. Joseph did not raise any issues associated with the trial court's handling of the in camera review of the witness statements. In his appeal to the Ohio Supreme Court, Mr. Joseph asserted, for the first time, in Proposition of Law No. XXXII, that the trial court misapplied Rule 16(B)(1)(g). The Ohio Supreme Court did not address this claim in its opinion.

Due to Mr. Joseph's failure to raise this claim before the Ohio Court of Appeals, the State contends that he procedurally defaulted it. In this case, it cannot be seriously contested that Mr. Joseph failed to comply with the Ohio Supreme Court's procedural rule that it will only consider claims which were first presented to the Court of Appeals. State v. Comely, 56 Ohio St. 2d 1, 4 (1978); State v. Williams, 51 Ohio St. 2d 112 syllabus ¶ 2 (1977). Although the Ohio Supreme Court was silent as to its reasons for rejecting Mr. Joseph's claim regarding Rule 16 violations by

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[23] The trial court did not review Mr. Heuerman's witness statement because his testimony was struck from the record. (Tr. 1522). It is not readily apparent from the record whether the trial court reviewed Ms. Joseph's witness statement.

the trial court, this Court assumes that it considered this claim and that it enforced the applicable procedural bar. See Simpson v. Sparkman, 94 F.3d 199, 203 (6th Cir. 1996); Bonilla v. Hurley, 370 F.3d 494, 497 (6th Cir. 2004). The application of this procedural bar serves as an adequate and independent state ground on which the state can rely to foreclose federal review of Mr. Joseph's claim. Eskridge v. Konteh, 88 Fed. Appx. 831, 837-38 (6th Cir. 2004).

Accordingly, Mr. Joseph's eighteenth ground for relief is procedurally defaulted. Because Mr. Joseph has not demonstrated cause and prejudice to excuse this default, the Court does not reach the merits of this claim.

F. Merits Analysis

1. Improper Death Penalty Specification: First and Second Grounds for Relief

In his first two grounds for relief, Mr. Joseph argues that his constitutional rights were violated because of an invalid death penalty specification in the indictment and because of erroneous jury instructions based on that invalid specification. Essentially, Mr. Joseph contends that, beginning with the flawed capital specification, this case was tried on a theory that would not support the imposition of the death penalty, that the jury was instructed incorrectly on what must be found to sentence him to death, and that, therefore, he could not constitutionally be sentenced to death. This Court begins by examining Mr. Joseph's defective indictment claim and then turns to his erroneous jury instruction claim.

a. Defective Indictment (Ground One)

In his first ground for relief, Mr. Joseph contends that the indictment did not contain a valid specification to allow for the imposition of the death penalty and thereby violated Mr. Joseph's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

Ohio law provides that imposition of the death penalty for aggravated murder is precluded unless one or more capital specifications is specified in the indictment and proved beyond a reasonable doubt. a.R.c. § 2929.04(A). The capital specification relevant to this case is:

> The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping ... and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

O.R.C. § 2929.04(A)(7).

In this case, the Allen County Grand Jury returned an indictment, on 12 July 1990, charging that Mr. Joseph and Mr. Bulerin:

> did jointly purposely cause the death of another, to wit: Ryan R Young, while committing or while fleeing immediately after committing kidnapping.

(Ex. A). In addition to charging Mr. Joseph and Mr. Bulerin with aggravated murder in violation of Ohio RC. § 2903.01 (B), the indictment contained the following specification:

> The Grand Jurors further find and specify that the offense was committed, while the offenders were committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, and the offenders were the principal offenders in the commission of the kidnapping.

(Ex. A).

Mr. Joseph argues that the flawed indictment did not provide him with adequate notice of the charges against him and that the Ohio Supreme Court decision to the contrary was

an unreasonable application of clearly established law regarding a defendant's procedural due process right to notice of the specific charge against him.

i. Due Process Law

It is well-established that the Fifth Amendment's guarantee of a grand jury indictment does not apply to the states. Apprendi v. New Jersey, 530 U.S. 466, 477 n.3 (2000); Alexander v. Louisiana, 405 U.S. 625, 633 (1972); Hurtado v. California, 110 U.S. 516, 538 (1884) Lucas v. O'Dea, 179 F.3d 412, 417 (6th Cir. 2001). However, the due process clause of the Fourteenth Amendment mandates that whatever charging method the state employs must give the criminal defendant fair notice of the charges against him to permit adequate preparation of his defense. Jackson v. Virginia, 443 U.S. 307, 314 (1979); Olsen v. McFaul, 843 F.2d 918, 930 (6th Cir. 1988); Blake v. Morford, 563 F.2d 248, 250 (6th Cir. 1977) (explaining that "a constitutional violation occurs [when] an accused is not given proper notice in the indictment of an offense for which he is to be tried"). This requires that the offense be described with some precision and certainty so as to apprise the accused of the crime with which he stands charged. Jackson, 443 U.S. at 314. In Cole v. Arkansas, the United States Supreme Court emphasized the importance of this right:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

333 U.S. 196, 201 (1948). "It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process." Jackson v. Virginia, 443 U.S. 307, 314 (1979). Accordingly, a material alteration to the charging terms of an indictment, either literally or in effect, by the

prosecutor or the court after the grand jury has last passed on them amounts to a constructive amendment or "fatal variance" which violates a defendants' "due process right to be informed of the nature of the accusations against him." Lucas v. O'Dea, 179 F.3d 412, 416-17 (6th Cir. 1999). Except for the due process requirement of notice, any other claimed deficiencies in a state criminal indictment are not cognizable on federal collateral review. Roe v. Baker, 316 F.3d 557, 570 (6th Cir. 2002); Mira v. Marshall, 806 F .2d 636, 639 (6th Cir. 1986).

ii. Due Process Analysis

In examining Mr. Joseph's defective indictment claim, the Ohio Supreme Court correctly identified the governing legal principle to require that the charging mechanism, in this case the indictment, provide Mr. Joseph with "sufficient and adequate notice of the charge against him and the death-penalty specification alleged." 73 Ohio St. 3d at 456. The remaining question, therefore, is whether its decision constituted an unreasonable application of that principle or whether its decision was based on an unreasonable determination of the facts. The Ohio Supreme Court agreed with Mr. Joseph that "the last part of the specification should have indicated the offenders were the principal offenders in the commission of the aggravated murder, and not merely the kidnapping." 73 Ohio St. 3d at 455. However, it concluded that this error was merely technical and did not render the indictment invalid because the "record demonstrates that [Mr. Joseph] had sufficient notice that he was being tried as a principal offender in the commission of the aggravated murder of Ryan Young while committing kidnapping." Id. at 455-57. Because "the specification stated verbatim the relevant language of R.C. 2929.04(A)(7), except for the substitutional error in the last word of the specification," the Supreme Court of Ohio found that "the correct language of the specification was clearly ascertainable to Mr. Joseph" and that "Mr. Joseph certainly had sufficient notice from the

wording of the specification that the aggravating circumstance set forth in R.C. 2929.04(A)(7) was being alleged." kL. at 456-57. The Supreme Court of Ohio further noted that "[Mr. Joseph], his attorneys, the prosecutor, and the trial judge treated the indictment as valid at all stages of the proceedings, never noticing any flaw in the indictment." Id. at 457.

After a full and complete review of the record and an analysis of applicable law, this Court finds that the Ohio Supreme Court unreasonably applied clearly established federal law in adjudicating Mr. Joseph's due process claim related to the defective indictment. Treating the incorrect specification as merely a "technical error," the Ohio Supreme Court found that the wording of the specification was sufficiently similar to the proper death penalty specification that it "recited an obvious and undeniable reference to RC. 2929.04(A)(7) (the felony murder specification)" and that the "correct language was clearly ascertainable" to Mr. Joseph. 73 Ohio St. 3d at 456-57. In light of United States Supreme Court precedent requiring that the charging mechanism contain sufficient specificity to apprize the defendant of the charges against him, the Ohio Supreme Court's conclusion was not only incorrect but was unreasonable.

As noted above, the indictment charged Mr. Joseph and Mr. Bulerin with aggravated murder in violation of Ohio RC. § 2903.01 (B) and contained the following specification:

> The Grand Jurors further find and specify that the offense was committed, while the offenders were committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, and the offenders were the principal offenders in the commission of the kidnapping.

The indictment contained no explicit reference to O.RC. § 2929.04(A)(7), the death penalty specification upon which

Mr. Joseph was ultimately sentenced, nor did it include all the critical sentencing elements or facts – i.e. that Mr. Joseph was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

Notwithstanding this obviously flawed indictment, the Ohio Supreme Court attempted to buoy its conclusion that Mr. Joseph was nonetheless afforded sufficient notice of the unstated death penalty specification by noting that "appellant, his attorneys, the prosecutor, and the trial judge treated the indictment as valid at all stages of the proceedings, never noticing any flaw in the indictment." 73 Ohio St. 3d at 457. While the parties did treat the indictment as valid, their subsequent presentation of the case is replete with examples demonstrating that their understanding of the death penalty specification was far from clear. In his opening statement, Assistant County Prosecutor Berry described the case as "an aggravated murder case with a specification of kidnapping." (Tr. 1201). Likewise, Defense Counsel Novak twice referred to the "specification of kidnapping" in his opening statement. (Tr. 1221-24). At closing arguments during the guilt/innocence phase of the trial, County Prosecutor Bowers concluded by saying that "Circumstantial evidence proves that this defendant is guilty of aggravated murder with a specification of kidnapping." (Tr. 2049). While Mr. Joseph's participation in the kidnapping of Ryan Young constitutes one of two requisite elements of the applicable specification, both attorneys' reference solely to the kidnapping as the "specification" or aggravating circumstance only served to underscore the flawed indictment. Moreover, it further obscured the statutory requirement that Mr. Joseph be the principal offender in the commission of the aggravated murder for the death penalty specification to apply. In instructing the jury on the specification, Judge Basinger read it as written in the indictment, with the phrase "the principal

offenders in the commission of the kidnapping." (Tr.2066-67). In fact, the verdict form was the only thing which included the specification language required for the imposition of the death penalty. (Tr. 2074-75).

In a chambers conference prior to the capital sentencing or mitigation hearing, the judge explained that counsel's arguments would be limited to arguing whether the aggravating circumstance outweighs any mitigating factors. (Mitigation Tr. 5). The judge explained that the only aggravating circumstance in this case was the specification set forth in the indictment. (Mitigation Tr. 6-7). Both Defense Counsel Novak and the judge expressed their understanding that the aggravating circumstance was the kidnapping. (Mitigation Tr. 9-10). In his initial mitigation phase instructions to the jury, Judge Basinger explained that the aggravating circumstance the jury must consider is the specification in the indictment and again read the specification with the "principal offenders in the commission of the kidnapping" language. (Mitigation Tr. 24-26). Referring to the indictment, he emphasized that "it is the presence of the aggravating circumstance which warrants your consideration of the three possible penalties," including the death penalty. (Mitigation Tr. 26-28). Defense Counsel Weller's opening statement included three references to the kidnapping as the aggravating circumstance, including the statement that "[t]he kidnapping, and the kidnapping alone, is the aggravating circumstance." (Mitigation Tr. 29-32). During closing arguments, Assistant County Prosecutor Berry exemplified the ongoing confusion regarding the charges by first stating that "the aggravating circumstance was set out in the indictment," then paraphrased the indictment inserting the "principal offender in the commission of the aggravated murder" language, and finally presenting the kidnapping as the aggravating circumstance. (Mitigation Tr. 282). Defense Counsel Weller twice referred

to the kidnapping as the aggravating circumstance and told the jury that:

> [A] death sentence or death penalty may be imposed only if all twelve of you agree unanimously that the aggravating circumstance, in this case that being kidnapping, outweighs those mitigating factors presented ... by proof beyond a reasonable doubt.

(Mitigation Tr. 302-303). In the State's rebuttal, County Prosecutor Bowers implored the jury to weigh the mitigating factors "against the kidnapping, the specification of kidnapping which you have already found beyond a reasonable doubt" and asserted that the evidence shows that "the kidnapping, the aggravated aspect of the kidnapping, outweighs these mitigating circumstances beyond a reasonable doubt." (Mitigation Tr. 315 and 320).

In his final instructions to the jury, Judge Basinger explained that the jury's job was to determine whether the State proved beyond a reasonable doubt that the aggravating circumstance set forth in the specification in the indictment outweighs the mitigating factors. (Mitigation Tr. 322). Shortly thereafter, Judge Basinger stated the specification and included the "principal offender in the commission of the aggravated murder" language. (Mitigation Tr. 326). The verdict forms provided to the jury referred generically to the "aggravating circumstance that the defendant was found guilty of committing." (Mitigation Tr. 330-32). After the jury returned its verdict recommending a sentence of death, Judge Basinger provided defense counsel an opportunity to address him and Defense Counsel Novak again referred to the aggravating circumstance in this case as the kidnapping, made detailed arguments related to the kidnapping, and stated that "there are cases where there are kidnappings and the death penalty isn't given." (Mitigation 360-63). In issuing Mr. Joseph's sentence, Judge Basinger stated:

> Wherefore, on the count of aggravated murder with the specification of kidnapping the Court sentences you to be delivered to the Sheriff of this County to the Orient Reception Center ... wherein on June 26, 1991 you'll be put to death by electrocution.

(Mitigation Tr. 365-66). While the judge's reference to the "specification of kidnapping" may simply be an abbreviated statement of the proper specification which included the "principal offender in the commission of the aggravated murder" language, it is equally likely, given the confusion about the proper specification in this case, that the jury recommended and the judge imposed the death penalty based upon an improper specification.

The foregoing illustrates the existence of a fundamental and pervasive misunderstanding of the specification with which Mr. Joseph was charged which infected every stage of this case and which was held by the judge, Mr. Joseph's defense attorneys, and the state prosecutors.[24] Thus, while

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[24] Despite the defective indictment, the State suggests that Mr. Joseph received actual notice of the "theory" upon which the State was proceeding in its supplemental response to defendant's motion for a bill of particulars, which stated in pertinent part:

> Defendant purposefully killed Ryan Young with a knife inflicting several wounds including to the right flank and to the base of the skull which severed the spinal chord.

(Ex. CU). This claim of actual notice is belied by both the relevant facts and applicable law. To begin with, the prosecution did not in fact proceed on the theory that Richard Joseph actually killed Ryan Young as exemplified by its opening and closing arguments:

> I wish I could tell you exactly what happened. I don't know who struck the death blow. (Tr. 197).

> We don't know which one did it. We don't have to prove that. (Tr. 2041-42).

Moreover, as discussed in more detail above, it is evident that nobody involved in the case was entirely clear about the specification which was actually charged and had to be proven beyond a reasonable doubt.

the Ohio Supreme Court is correct that his attorneys, the prosecutor, and the trial judge all failed to notice the flaw in the indictment, it was not because the specification charged was so clear but rather because it was exceedingly opaque. It is precisely to avoid the resulting uncertainty and lack of clarity which occurred in this case that defendants have a due process right to know the specific charges lodged against them. See Combs v. Tennessee, 530 F.2d 695, 698 (6th Cir. 1976) (holding that "[s]uch definiteness and certainty are required as will enable a presumptively innocent man to prepare for trial.").

In support of its conclusion that the indictment provided sufficient notice of the death-penalty specification, the Supreme Court of Ohio noted that the jury verdict forms correctly phrased the specification. 73 Ohio St. 3d at 457. Rather than generating support for the Ohio Supreme Court's conclusion, the correctly phrased verdict forms, in light of repeated arguments and confusing instructions stating the incorrect specification during both the guilt/innocence and penalty phases, actually undercut the Ohio Supreme Court's decision. To allow Mr. Joseph to be convicted on a death penalty specification that requires him to have been the principal offender in the commission of the aggravated murder, when he was merely indicted on a specification of being a principal offender in the commission of the kidnapping in a case which was primarily argued and presented to the jury on that basis, results in "a conviction upon a charge not made," a result which is fundamentally offensive to due process. Jackson, 443 U.S. at 314; Dejonge v. Oregon, 299 U.S. 353, 362 (1937) (asserting that

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Finally, even if the state's supplemental response provided Mr. Joseph with additional information about the event complained of, his due process rights are nonetheless violated if the charging instrument does not provide him with sufficient notice of the crime charged. Koontz v. Glossa, 731 F.2d 365, 370 (6th Cir. 1984).

"conviction upon a charge not made would be a sheer denial of due process"); Watson v. Jargo, 558 F.2d 330, 339 (explaining that "to allow the prosecution to amend the indictment at trial so as to enable the prosecution to seek a conviction on a charge not brought by the grand jury unquestionably constituted a denial of due process by not giving appellant fair notice of criminal charges to be brought against him.") As in the Sixth Circuit's decisions in Watson and Lucas, Mr. Joseph was denied due process of law where he was charged with aggravated murder without a death penalty specification but convicted of aggravated murder with a death penalty specification. Watson v. Jargo, 558 F.2d 330, 338-39 (6th Cir. 1977) (petitioner was denied due process of law where charged with first degree premeditated murder but forced to defend against felony murder); Lucas, 179 F .3d at 415-17 (petitioner was denied due process of law where indicted for intentional murder but the jury was instructed that petitioner could be found guilty based on a different state of mind).[25] In "effectively holding that the State may obtain a death sentence based not upon what was actually charged in the indictment" but upon what should have been charged, Joseph, 73 Ohio St. 3d at 466 (Moyer, C.J. dissenting), the Ohio Supreme Court transgressed the federal constitutional mandate of due process.

Having found a violation of Mr. Joseph's constitutional right to due process, the Court next turns to the issue of whether it should be subjected to harmless error review and, if so, whether the due process violation in this case can be characterized as harmless. In analyzing constitutional

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[25] While many of these cases speak in terms of whether an indictment was constructively amended, the essential constitutional issue in cases originating from state courts, regardless of the precise language used, relates to fair notice of the charges against the defendant. Browning v. Foltz, 837 F.2d 276, 280 n.5 (6th Cir. 1988); Lucas v. O'Dea, 179 F.3d 412, 417-18 (6th Cir. 1999).

violations, the United States Supreme Court has differentiated between structural and trial errors. Arizona v. Fulminante, 499 U.S. 279, 306-310 (1991). Structural errors are defects that permeate "the entire conduct of the trial from beginning to end" or that affect "the framework within which the trial proceeds, rather than simply an error in the trial process itself." Fulminante, 499 U.S. at 309-310; see also Billinaslea v. Jackson, 83 Fed. Appx. 33, 40 (6th Cir. 2003) (quoting Yohn v. Love, 76 F.3d 508, 522 (3d. Cir. 1996)) (explaining that "[a] structural error is a defect in the trial mechanism itself, affecting the entire trial process, and is per se prejudicial," whereas "trial error occurs during the presentation of the case to the jury, and may be quantitatively assessed in the context of all other evidence.") Because structural errors so infect the trial process, they can never be considered harmless. See, e.g., Tumey v. Ohio, 273 U.S. 510 (1927) (biased trial judge); Gideon v. Wainwright, 372 U.S. 335 (1963) (complete denial of counsel); Waller v. Georgia, 467 U.S. 39 (1983) (right to a public trial); Vasquez v. Hillary, 474 U.S. 254 (1984) (racial discrimination in selection of a grand jury); McKaskle v. Wiggins, 465 U.S. 168 (1984) (denial of self-representation at trial). Trial errors, unlike structural errors, are subject to harmless-error analysis. Brecht v. Abrahamson, 507 U.S. 619, 629 (1993). On habeas review of trial errors, a petitioner is only entitled to relief if the error had a "substantial or injurious effect or influence in determining the jury's verdict." Id. at 637-38; Bulls v. Jones, 274 F.3d 329, 335 (6th Cir. 2001).

In failing to charge Mr. Joseph with a proper death penalty specification but then submitting the correct specification to the jury, the State constructively amended the indictment and denied Mr. Joseph his due process right to notice of the charges against him. In cases arising within the federal court system, such violations have been evaluated in terms of a defendant's Fifth Amendment right to an indictment and have been considered structural errors, which

are prejudicial per se and not subject to harmless error review. U.S. v. Ford, 872 F.2d 1231, 1235-36 (6th Cir. 1989). While the Sixth Circuit has not explicitly addressed whether a harmless error analysis should be applied on collateral review to due process violations of equivalent severity, see Lucas, 179 F.3d at 419, this Court nonetheless finds that the State's failure to provide Mr. Joseph with sufficient notice of the charges against him should not be subjected to a harmless error analysis because it amounts to a defect in the trial mechanism itself which is prejudicial per se.

However, even if this constitutional violation were to be considered a trial error, it was not harmless because there is a real probability that the error had a substantial or injurious effect in determining the jury's verdict. As noted above, because of the flawed indictment, the parties as well as the judge tread down the wrong path, trying and submitting this case to the jury on an improper specification. This injurious effect is not obviated, as suggested by the Ohio Supreme Court, merely because the jury verdict form correctly phrased the specification, the trial judge read this verdict form to the jury, and the jury signed the correctly phrased verdict form. While the jury may have convicted Mr. Joseph based on the proper specification-as being the principal offender in the commission of the aggravated murder, they very well may have convicted him based on being the principal offender in the commission of the kidnapping - as charged in the indictment - or, at the very least, have misunderstood what was required to find Mr. Joseph guilty of the uncharged specification. Thus, a reasonable likelihood exists that Mr. Joseph became eligible for the imposition of the death penalty even though a jury did not find the statutorily

required death penalty specification. Accordingly, the error cannot be deemed harmless.[26]

iii. Conclusion

Accordingly, because the Ohio Supreme Court's conclusion that the death penalty specification provided sufficient notice to Mr. Joseph to satisfy due process is based on an unreasonable application of clearly established federal law and an unreasonable determination of the facts, Mr. Joseph's first claim for relief is well-taken.

b. Improper Jury Instruction on the Death Penalty Specification (Ground Two)

In his second ground for relief, Mr. Joseph contends that the judge misinstructed the jury, at both the guilt/innocence

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[26] In addition to substantially influencing the jury's verdict directly, this incorrect specification may have influenced it indirectly. If Mr. Joseph and his counsel had proper notice of the specification, it is likely they would have made the persuasive, and potentially dispositive, argument that, because the State admitted that it did not know who killed Ryan Young, it could not prove that Mr. Joseph was the principal offender in the commission of the aggravated murder. Because such a logical argument was never advanced, the jury's verdict may have been injuriously affected. The Sixth Circuit's opinion in Olsen v. McFaul, is instructive as details the prejudicial effects associated with insufficient notice:

> Had the indictment provided fair notice of the charges, Olsen's counsel, who otherwise performed quite creditably, would have had the opportunity to anticipate how each element of the offense would most likely be addressed in the state's proofs and to research the point of municipal liability on unauthorized contracts which was obviously the keystone of the state's case. He might then have discovered the crucial flaw in the state's legal theory. Instead, he had time only to object repeatedly and to contest the case on the assumption that the state's view of the law was correct.

843 F.2d 918, 931 (6th Cir. 1988). As in Olsen, the insufficient notice in the indictment may well have caused Mr. Joseph's counsel to miss a "crucial flaw in the state's legal theory."

and penalty phases of the trial, as to the requirements for finding him guilty of capital murder.

i. Guilt/Innocence Phase Instruction

At the outset of his guilt/innocence phase instructions, the trial judge stated:

Ladies and gentleman of the jury, you have heard the evidence and the arguments of counsel. It is my duty to instruct you on the law which applies to this case. The Court and the jury have separate functions; you decide the disputed facts and the Court provides the instructions of law. It is your duty to accept these instructions and to apply the law as it is given to you. You are not permitted to change the law, nor to apply your concept of what you think the law should be.

(Tr. at 2052). During his instructions on the various elements of the offenses, the trial judge explained:

> If you find the defendant is guilty of aggravated murder it is your duty to deliberate further and decide an additional factual question, that is, the specification of an aggravating circumstance as set forth in the indictment.
>
> You will thus continue with your deliberations as to whether or not the State proved beyond a reasonable doubt that the defendant is guilty of said specification . . .
>
> The State charges in the specification that the defendant committed the offense of aggravated murder while the said offense was committed [sic] while the offenders were committing, attempting to commit, or fleeing immediately thereafter committing or attempting to commit kidnapping and the offenders were the principal offenders in the commission of the kidnapping.

(Tr. at 2065-67). In defining principal offender, the trial judge explained that "a principal offender or offenders is defined as the person or persons primarily responsible for the alleged illegal conduct involved." (Tr. at 2067). After completing its instructions on the offenses, the trial judge went over the verdict forms, explaining in pertinent part:

> The form continues. If you find that the above finding is guilty, you will complete the following specification .... The specification is as follows. "The offense charged," and then an asterisk which leads you to down below and you should insert 'was' or 'was not', "committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, and the offender was the principal offender in the commission of the aggravated murder." It then has a date and signature lines.

(Tr. at 2074-75).

In addressing Mr. Joseph's claim on direct review, the Ohio Court of Appeals recognized that the trial court provided the jury with two different specifications, one which was erroneous and the other which contained the properly worded specification. (Ex. EP at 31). It explained that the "jury heard two versions of the specification and signed their names to the verdict which contained the correct specification." (Ex. EP at 31). Applying plain error review because Mr. Joseph's trial counsel failed to contemporaneously object to the instruction, the Court of Appeals concluded that Mr. Joseph was not prejudiced by the alleged error and that there has been no miscarriage of justice. (Ex. EP at 32).

ii. Penalty Phase Instruction

In its initial mitigation phase instructions to the jury, the trial court likewise explained that the aggravating circumstance the jury must consider is the specification in the indictment and again read the specification language with the "principal offenders in the commission of the kidnapping." (Mitigation Tr. 24-26). After the parties presented their evidence and arguments, the trial court began its penalty phase instructions as follows:

> Members of the jury, at the first phase of this trial you decided the issues of guilt or innocence on the charge of aggravated murder and on the specification of the aggravating circumstance ....
>
> In this second phase or mitigating proceeding, additional arguments of counsel for the State have been presented relative to the aggravating circumstance the defendant was found guilty of committing ....
>
> It is now my duty to instruct you on the law which applies to this proceeding. Again, the Court and the jury have separate functions. You decide the disputed facts and the Court provides the instructions of law. It is your sworn duty to accept these instructions and to apply the law as it is given to you. You are not permitted to change the law, nor to apply your own conception of what you think the law should be, nor are you to disregard the law in order to avoid an unpleasant decision.

(Mitigation Tr. at 320-21). The Court went on to describe the purpose of the proceeding and to define the aggravating circumstance:

> [T]he purpose of this proceeding is to have you decide whether or not the aggravating circumstance the defendant was found guilty of committing outweighs

> the factors in mitigation for the imposition of the sentence of death.
>
> In the single count the aggravating circumstance is precisely set out in the specification. Completely stated, it is as follows: "The offense charged was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, and the offender was a principal offender in the commission of the aggravated murder."

(Mitigation Tr. at 325-26).

In its opinion addressing the penalty phase instruction, the Ohio Supreme Court conceded that the instruction was erroneous but nonetheless found that "this error was cured, as the trial court subsequently read to the jury the correctly worded specification." Joseph, 73 Ohio St. 3d at 461.

iii. Analysis

Having already excused Mr. Joseph's procedural default of this claim, based on his counsel's failure to object, for cause and prejudice, this Court proceeds to analyze the merits of his claim. "In a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement." Middleton v. McNeill, 124 S. Ct. 1830, 1832 (2004). As not every "ambiguity, inconsistency, or deficiency" in a jury instruction rises to the level of a due process violation, courts must determine "whether the ailing instruction ... so infected the entire trial that the resulting conviction violates due process." Id. (quoting Estelle v. McGuire, 502 U.S. 62, 72 (1991)); see also Baze v. Parker, 371 F.3d 310,327 (6th Cir. 2004); Millender v. Adams, 376 F.3d 520,527-28 (6th Cir. 2004). If the charge as a whole is ambiguous, the question becomes "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that

violates the Constitution. Id. (quoting Estelle, 502 U.S. at 72). In assessing the propriety of a particular instruction, it must be judged "in the context of the instructions as a whole and the trial record." Estelle, 502 U.S. at 72. Jury instructions that may be ambiguous in the abstract "can be cured when read in conjunction with other instructions." Estelle, 502 U.S. at 74-75.

This Court begins with Mr. Joseph's allegations of an erroneous jury instruction in the guilt/innocence phase of his trial, a claim which was considered and rejected by the Ohio Court of Appeals. Because the Ohio Court of Appeals reviewed Mr. Joseph's erroneous jury instruction claim for plain error, it considered whether the instruction resulted in a "fundamental miscarriage of justice" rather than whether it was reasonably likely to mislead the jury in manner violative of due process. In assessing the conclusion reached by the Ohio Court of Appeals under the proper standard, this Court finds that its decision amounts to an unreasonable application of federal law.

Estelle directs federal courts to consider the challenged jury instruction in the context of the instructions as a whole and the trial record. Considering only the instructions themselves, it is reasonably likely that the jury followed the court's initial instruction and found that Mr. Joseph was the principal offender in the commission of the kidnapping rather than in the commission of the aggravated murder, notwithstanding the verdict form. The trial court's contradictory instructions create an ambiguity so severe that a jury could reasonably have followed either one, and, if they followed the erroneous instruction then Mr. Joseph was unlawfully convicted of the death penalty specification in violation of due process. Cf. U.S. v. Davis, 306 F.3d 398, 416 (6th Cir. 2002) (explaining that juries "are presumed to follow the instructions they are given.") When one considers the trial record as a whole, it becomes even more likely that the jury convicted Mr. Joseph based on the wrong

specification. Weighing against a verdict form containing the correct specification and the trial court's description of it, the jury was faced with the indictment and another jury instruction which contained the wrong specification and was presented, as discussed in conjunction with Mr. Joseph's first ground for relief, with arguments consistently premised on the wrong specification. Considering the erroneous instruction in its proper context, it is reasonably likely that the jury instruction stating the incorrect death penalty specification relieved the State of its burden of proving an aggravating circumstance to support the imposition of the death penalty, thereby violating due process. The state court's decision that the erroneous instruction did not warrant reversal constitutes an unreasonable application of federal law.[27]

Because this Court finds that the trial court's erroneous instruction during the guilt/innocence phase rendered Mr. Joseph's conviction on the aggravating circumstance unconstitutional, it does not proceed to consider his similar objections to the trial court's instructions during the penalty phase.

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[27] The United States Supreme Court, in Middleton, concluded that the state court did not unreasonably apply federal law when it concluded that the jury was not reasonably likely to be misled on the basis of one incorrect phrase in the voluntary manslaughter and imperfect-self defense instruction given that, on three other occasions in the jury instructions, the correct instruction was given. 124 S.Ct. at 1832-33. The facts in this case render Middleton inapposite. Unlike in Middleton, two directly contrary instructions were given and the improper instruction was reinforced by a flawed indictment and misleading legal arguments advanced by both the prosecutor and defense counsel at trial. As noted by the Third Circuit in Everett v. Beard, the assessment of improper jury instructions must be conducted on a case-by-case basis and the "mere fact that the law was correctly stated in one part of the charge will not automatically insulate the charge from a determination of error." 290 F.3d 500, 512 (3d Cir. 2002). As with the improper instruction, the correct instruction should not be considered in isolation.

2. Voir Dire: Seventh and Eleventh Grounds for Relief

In grounds seven and eleven, Mr. Joseph contends that the trial court improperly conducted voir dire in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Specifically, he argues that the trial court improperly denied three of his challenges for cause (ground seven) and that its inquiry regarding the death penalty exceeded the bounds set by Witherspoon v. Illinois, 391 U.S. 510 (1968). The Court takes each argument in turn.

a. Improper Denial of Challenges for Cause (Ground Seven)

In his seventh ground for relief, Mr. Joseph argues that he was improperly forced to use three of his peremptory challenges to remove prospective jurors Janice Mcintosh, Ladona First, and Charlene Hites because the trial court improperly denied his challenges to these jurors for cause. The Ohio Court of Appeals rejected this argument, concluding that the trial court did not abuse its discretion and that Mr. Joseph has stated no constitutional violation. (Ex. EP at 57-58). Mr. Joseph argues that this decision was an unreasonable application of Ross v. Oklahoma, 487 U.S. 81 (1988).

Rather than supporting Mr. Joseph's contention, Ross actually undercuts it. In Ross, the United States Supreme Court explained that "peremptory challenges are not of constitutional dimension" and concluded that the fact that a defendant had to use a peremptory challenge to achieve an impartial jury does not constitute a violation of the Sixth Amendment. 487 U.S. at 88. Put simply, it is not a constitutional violation "if a defendant had to use a peremptory strike to remove a juror who should have been removed for cause." Baze, 371 F.3d at 327 (citing United States v. Martinez-Salazar, 528 U.S. 304, 315-17 (2000). Given that it is not a constitutional violation if a defendant

must use peremptory challenges to dismiss jurors who should have been dismissed for cause, the Ohio Court of Appeals' decision is not an unreasonable application of federal law. Accordingly, Mr. Joseph is not entitled to relief on these grounds.[28]

b. Improper Voir Dire on the Death Penalty (Ground Eleven)

In his eleventh ground for relief, Mr. Joseph argues that the trial court's improper voir dire concerning the death penalty deprived him of his constitutional right to have "his guilt and mitigation phases determined by an impartial jury as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution." During individual voir dire in Mr. Joseph's case, the trial court asked all of the seated jurors a series of questions which included the following:

> In a proper case and if the facts warrant it and the law permits it, could you join with your fellow jurors in signing a verdict which might result in the imposition of the death penalty?
>
> Do you currently hold any opinions which would preclude you from finding a defendant guilty of an offense punishable by death?

(Tr. 285-86, 355, 364-65, 379, 394, 409, 538, 572-73, 632, 719, 780, 814-15). Mr. Joseph contends that, in asking these questions, the trial court exceeded the mandates of

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[28] In support of his argument, Mr. Joseph contends that a constitutional violation does in fact occur when peremptory challenges must be used in place of challenges if the seated jury is not impartial. While Mr. Joseph is correct that he is entitled to an impartial jury, he is wrong that the constitutional violation could occur from the denial of peremptory challenges. The constitutional violation, if any, is that the ultimate jury who heard his case was not impartial. Mr. Joseph's arguments regarding the partiality of the jury are set forth in grounds six and eleven and considered by this Court in its analysis of those grounds for relief.

Witherspoon by "seeking a personal commitment" and "securing jurors attuned to return a death verdict." (Docket #83, at 95).

While the "Constitution does not prohibit the States from 'death qualifying' juries in capital cases" by removing for cause "prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors," Lockhart v. McCree, 476 U.S. 162, 173 (1986), a juror may not be excluded merely because he or she "voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction," Witherspoon, 391 U.S. at 522. In addition, a capital defendant may excuse for cause any juror who will automatically vote for the death penalty in every case. Morgan v. Illinois, 504 U.S. 719, 729 (1992). In Wainwright v. Witt, the United States Supreme Court held that:

> the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment ... is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

469 U.S. 412, 424 (1985). To avoid the imposition of the death penalty by a "hanging jury," a prospective juror "cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him." Witherspoon, 391 U.S. at 522-23 n.21. However, in order for the state and the defendant to intelligently exercise their challenges for cause based on the prospective jurors' impartial views on the death penalty, trial courts shall, at the request of the parties, permit an inquiry into prospective jurors' death penalty views in general. Morgan, 504 U.S. at 735-36; Lockhart, 476 U.S. at 170, n.7.

On direct review, the Ohio Court of Appeals found that the trial court complied with the constitutional requirements of Witherspoon and Witt because:

> The questions asked by the trial judge were sufficiently general and did not serve to create a jury that would disregard the law and return a verdict recommending death.

(Ex. EP at 88). In so finding, the Ohio Court of Appeals did not unreasonably apply clearly established federal law. In its questioning, the trial court did not ask, explicitly or implicitly, whether the jurors would impose the death penalty in this case and certainly secured no commitments that they would do so. Rather, as permitted by Witherspoon and its progeny, the judge merely inquired into whether the jurors could follow the law and impose the death penalty and whether they held any views which would prevent them from finding a defendant guilty of an offense punishable by death. Accordingly, Mr. Joseph's eleventh claim lacks merit.[29]

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[29] In his traverse, Mr. Joseph contends that the court's death penalty voir dire was particularly problematic because it was one-sided in that "the Court never questioned the panel concerning whether they would always impose the death penalty." (Docket #89, at 84). While the defendant is entitled to an inquiry of whether the jurors would automatically impose the death penalty, such an inquiry is only mandatory upon his request, a request not made by Mr. Joseph in this case. See Morgan, 504 U.S. at 735-36. Moreover, defense counsel was given the opportunity to question each prospective juror and did ask them whether they would consider all the alternative penalties in this case. Mr. Joseph has not pointed to any Supreme Court holdings which require a judge, who asks whether a juror would be able to impose the death penalty, to also inquire into whether a juror would automatically impose the death penalty.

3. Alleged Trial Errors: Sixth, Ninth, Thirteenth, Fourteenth, Fifteenth, Seventeenth, and Eighteenth Grounds for Relief

Mr. Joseph asserts a number of errors related to the manner in which the trial judge conducted the trial. This Court addresses each in turn.

a. Improper Denial of Change of Venue (Ground Six)

In his sixth ground for relief, Mr. Joseph argues that the trial court's refusal to grant his change of venue motion constituted a denial of his right to "an impartial jury and a fair trial as guaranteed by the Sixth and Fourteenth Amendments." (Docket #83, at 72). Mr. Joseph asserts that prejudice against him must be presumed given the constant and intense publicity this case engendered in Allen County. In rejecting this argument, the Ohio Court of Appeals concluded that Mr. Joseph's assertion, that "jury bias should have been presumed as a result of the extensive media coverage," lacks merit. (Ex. EP at 15). Having reviewed the jury voir dire, the Ohio Court of Appeals further held that, despite their familiarity with the case, the jurors clearly indicated their ability to decide the case based upon the evidence adduced at trial and that the evidence of impartiality was consistent with the mandate of Irvin v. Dodd, 373 U.S. 723 (1961).

The constitutional standard of fairness requires that defendants have "a panel of impartial, indifferent jurors." Murphy v. Florida, 421 U.S. 794, 799 (1975). "[E]xtensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial constitutionally unfair." Dobbert v. Florida, 432 U.S. 282, 303 (1977). In analyzing the question of pretrial publicity and the ability to hold a fair trial, courts distinguish between cases involving "presumed prejudice - when the 'setting of the trial [is] inherently prejudicial, '- and actual prejudice -

when review of both the jury voir dire testimony and the extent and nature of the media coverage indicates 'a fair trial [was] impossible.'" Nevers v. Killinger, 169 F.3d 352,364 (6th Cir. 1999) (quoting Murphy v. Florida, 421 U.S. 794, 798 (1975)); see also Ritchie v. Rogers, 313 F.3d 948, 951-52 (6th Cir. 2002). In Murphy, the United States Supreme Court explained that prejudice should only be presumed in a "trial atmosphere that was utterly corrupted by press coverage." 421 U.S. at 798. In a highly publicized case, which does not involve the presumption of prejudice, a trial court has the responsibility to "confront the fact of publicity and determine whether that publicity rises to the level of 'actual prejudice.'" Ritchie, 313 F.3d at 962.

Arguing that "[t]his is a classic case where an inflammatory crime seized a quiet community," Mr. Joseph urges this Court to find that prejudice should have been presumed. (Docket #83, at 60). To illustrate the impact of the crime on the local community, Mr. Joseph points out that over 1000 local residents joined in the search for Ryan Young and approximately that many attended his funeral and a vigil in his honor. (PSDD). He also describes a "barrage of publicity" from media coverage that was "constant and intense." (Docket #83, at 61). At his deposition, taken on 11 January 1999, prosecuting attorney David Bowers testified that it was the highest profile case in his 22 years as a prosecutor and that "[y]ou had to be in outer space not to know that it was going on." (PSG at 1 0-11). Mr. Joseph asserts that certain stories were particularly prejudicial, such as two in the Columbus Dispatch which early on reported rumors that the murder was related to drugs or a fantasy game called "Dungeons and Dragons" and on the eve of trial reported that the two defendants did not plead guilty despite a belief that they would. (PSDD).

While there was substantial news coverage in the local press, such coverage did not utterly corrupt the trial

atmosphere.[30] Beginning on 27 June 1990 and continuing until Mr. Young's body was discovered, the Lima News ran eight articles detailing the disappearance of and search for Ryan Young. (PSDD). Once Mr. Bulerin and Mr. Joseph were arrested, the Lima News covered their arraignment and the pre-trial proceedings with approximately 24 articles over a seven-week period. (PSDD). During this same time period, other regional newspapers, including the Columbus Dispatch, Delphos Herald, the Findlay Courier, and the Toledo Blade, ran a combined total of about 34 articles largely echoing the coverage in the Lima News. (PSDD). After the initial articles covering the search for Mr. Young, the arrest of Joseph and Bulerin, and Mr. Young's funeral service-all of which occurred in June and July 1990, the press coverage was hardly sensational and consisted largely of short, factual articles covering such topics as the defendant's arraignment and indictment, the release of Mr. Forest, the appointment of counsel, the possibility of a change of venue, the appointment of a new judge, the potential cost of the trials, and pre-trial rulings. (PSDD). When jury selection began on 7 January 1991, the Lima News, along with the other local newspapers, ran several stories covering that process as well. (PSDD). Rumors about the motive behind the killing and the likelihood of a guilty plea were aberrations rather than the norm and did not permeate the press coverage in this case.

A careful review of the press coverage and publicity of this case "does not reveal the barrage of inflammatory publicity immediately prior to trial ... amounting to a huge wave of public passion." Patton v. Yount, 467 U.S. 1025, 1032-33 (1984). The proceedings in this case were quite unlike the "circus atmosphere" in Estes v. Texas, 381 U.S. 532 (1965), the "courthouse given over to accommodate the

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[30] The impact of local involvement in the search for Ryan Young on Mr. Joseph's ability to obtain a fair trial, as opposed to the press coverage of that involvement, can be gauged by assessing Mr. Joseph's claims of actual prejudice.

public appetite for carnival" in Sheppard v. Maxwell, 384 U.S. 333 (1966), or the unusual circumstances present in Rideau v. Louisiana, 373 U.S. 723 (1963) in which a 20-minute film of the defendant's confession was broadcast three times by a television station in the community where the crime and the trial took place. Murphy, 421 U.S. at 799 (describing these cases). Accordingly, the Ohio Court of Appeals' decision not to presume prejudice was not contrary to clearly established federal law.

Mr. Joseph also argues that a review of the process by which the trial court conducted voir dire and the responses of the jury members, who sat in his case, demonstrates actual prejudice eviscerating the possibility of a fair trial. With respect to the process, Mr. Joseph argues that the trial court's procedure, of informing prospective jurors that it would give them an instruction to ignore media reports of this case before determining the existence of any specific influences on the jurors, made it impossible for the trial court to adequately assess the affect of pretrial publicity on the jurors. (Docket #83, at 70-71). Citing to the voir dire transcript which illustrated that every juror had some prior knowledge of the case, Mr. Joseph contends that the jurors' familiarity demonstrates actual prejudice.

Contrary to Mr. Joseph's argument, the trial judge did not uniformly inform prospective jurors at the outset that he would be giving them an instruction to ignore media reports of the events.[31] Even when such an approach was taken, it did not undermine the court's ability to root out actual prejudice during the voir dire process. In this case, the trial court squarely confronted the problem of pre-trial publicity by engaging in a searching voir dire of prospective jurors,

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[31] Some jurors were simply asked whether they had read or heard anything about the case and then the judge moved on to whether the prospective juror had formed an opinion about Mr. Joseph's guilt or innocence. (Tr. 250).

following up on any hints of prejudice, and excusing potentially impartial jurors. While Mr. Joseph contends that the jurors had been exposed to the facts of this case, he fails to demonstrate any actual prejudice. To be fair and impartial, jurors need not "be totally ignorant of the facts and issues involved." Murphy, 421 U.S. at 799-800. "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irvin v. Dodd, 366 U.S. 717, 723 (1961). While a juror's assurances that he is equal to this task is not necessarily dispositive, the defendant must do more than demonstrate "the mere existence of any preconceived notion as to the guilt or innocence of an accused ... to rebut the presumption of a prospective juror's impartiality." Id. In this case, every juror stated that they could follow an instruction to disregard news media accounts in rendering a decision, that they could render an impartial verdict based solely upon the evidence presented at trial, and that they had formed no opinion about the case. Moreover, both the prosecutor and defense counsel were given a full and complete opportunity to ask their own questions to further assess the fairness of each prospective juror. A review of the voir dire transcript does not demonstrate the existence of a single, colorable claim of partiality on the part of the jurors who were ultimately seated in this case.

The Ohio Court of Appeals' conclusions, that prejudice should not be presumed in this case and that Mr. Joseph failed to demonstrate actual prejudice, are consistent with clearly established federal law. As in Dobbert, Mr. Joseph simply demonstrated that the community was well aware of the crime and the charges against him. 432 U.S. at 303. This is insufficient, without a showing of actual prejudice, to constitute a constitutional violation. Id. Accordingly, Mr. Joseph is not entitled to habeas relief on his sixth ground.

b. Miranda Violation (Ground Nine)

In his ninth ground for relief, Mr. Joseph argues that the trial court erred in admitting two statements made by him to the police in the absence of Miranda warnings. While Mr. Joseph made four statements to the authorities, he challenges only the admission of the statement made to police officers Murphy and Jacomet at 5:11 a.m. on 27 June 1990 and the statement made to Detective Ketchum on that same day at approximately 10:30 or 10:45 a.m.

At approximately 5:00 a.m. on 27 June 1990, officers Murphy and Jacomet went to Mr. Joseph's residence. (Tr. 1394; DC at 56). Both officers questioned Mr. Joseph and neither advised him of his rights. (Tr. 1398; DC at 58 and 63).[32] Mr. Joseph contends that any statements made to Murphy and Jacomet were inadmissible.

After this initial statement, Mr. Joseph came to the station and was questioned by Sergeant Jack Cheney for about ten to twenty minutes. (Tr. 1412 and 1419). Mr. Joseph does not challenge the admissibility of his statements to Sergeant Cheney as he was advised of his rights and signed a written waiver prior to speaking with Sergeant Cheney. (Tr. 1413). After his interview with Sergeant Cheney, Mr. Joseph left the police station. (Tr. 1419). Later that day, Mr. Joseph returned to the police station at which time Detective James Ketchum questioned him for approximately twenty to twenty-five minutes. (Ex. DC at 24-26 and 30).[33] Detective Ketchum did

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[32] Deputy King arrived at Mr. Joseph's residence a few minutes after officers Murphy and Jacomet. (Tr. 1394 and 1402-1403). After advising Mr. Joseph of his rights, Deputy King asked Mr. Joseph several questions. (Tr. 1395). Though some of his answers were inaudible, Mr. Joseph stated that he knew Ryan Young, that the last time he saw Mr. Young was approximately three weeks ago, and that the white Cutlass in the driveway was not his car. (Tr. 1395-96). Mr. Joseph does not challenge the statements made to Deputy King.

[33] The impetus for Mr. Joseph's return to the police station is somewhat unclear from the record. The Ohio Court of Appeals merely stated that

not admonish Mr. Joseph of his rights prior to the interview. (Ex. DC at 29). In response to Mr. Joseph's challenges to the admissibility of the 27 June 1990 statements to officers Jacomet and Murphy and then to Detective Ketchum, both the trial court and the Ohio Court of Appeals concluded that the statements should not be suppressed, despite the absence of Miranda warnings, because Mr. Joseph was not in custody at the time of either statement. (Ex. EP at 72 and EU at A-127-28).

A person questioned by law enforcement officers after being "taken into custody or otherwise deprived of his freedom of action in any significant way" must first "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Miranda v. Arizona, 384 U.S. 436, 444 (1966). "An officer's obligation to administer Miranda warnings attaches, however, 'only where there has been such a restriction on a person's freedom as to render him in custody.'" Stansbury v. California, 511 U.S. 318, 322 (1994) (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977)). While a court must examine all of the circumstances surrounding the interrogation in order to determine whether an individual was in custody for the purposes of Miranda, "the ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." Id. (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)). The in-custody requirement is an objective test: given the circumstances surrounding the interrogation "would a reasonable person have felt that he or she was not at liberty to terminate the interrogation and leave." Thompson v. Keohane, 516 U.S. 99,112 (1995).

"[l]ater that morning he was again taken to the sheriffs office by a deputy who picked him up from work" and that Mr. Joseph "voluntarily agreed to go with the deputy." (Ex. EP at 71).

Mr. Joseph's argument regarding his statements to officers Jacomet and Murphy can be dispensed with as the brief questioning conducted by the officers at Mr. Joseph's home certainly does not constitute a custodial interrogation. Cf. Beckwith v. U.S., 425 U.S. 341, 347-48 (1976) (concluding that three-hour interrogation by IRS agents in defendant's dining room did not implicate the prophylatic Miranda rule). While Detective Ketchum's interrogation of Mr. Joseph would present a closer question on de novo review, the Ohio Court of Appeals' application of the United States Supreme Court's general custody requirement is reasonable and "fits within the matrix of [its] prior decisions." Yarborough v. Alvarado, 124 S.Ct. 2140, 2148 (2004); see also Oregon v. Mathiason, 429 U.S. 492, 495 (1977). As noted in Yarborough, "fair-minded jurists could disagree over whether [Joseph] was in custody," because facts lend support to both conclusions. In support of a finding of custody, Mr. Joseph was picked up at work and transported by police officers to the police station and the questioning by Detective Ketchum, at times, contained veiled threats and accusations:

> Well, Richard, I'm going to explain something to you; okay? Right now we are conducting an investigation into some possible foul play, okay, involving an individual who you know. Okay? I think you know a little more than you told Detective Cheney. I think you know a little more than what you're telling me now. It would be best for you if you would tell me the truth and everything that you know that went down last night, okay, because if this comes out the way I think it's going to come out, some people are going to be in some serious trouble. Okay? You were seen last night, okay, on different occasions by different people. I've probably talked to fifteen or twenty people in the last two and a half hours that seen you guys cruising last night. The information I also have is

> that you were seen in the Thayer Road area last night. So, it's best for you, Rick, to tell me what happened last night that you know about. Don't hold nothing back. Now is the time to tell me what you know because if you sit here and stay silent and don't say anything it's really going to come down on you guys later on. You know what I'm talking about. What was the altercation about last night?

(Ex. DC at 27-28). On the other hand, Mr. Joseph voluntarily agreed to go to the police station to answer questions, was never told that he could not leave at any time, and was only questioned for approximately twenty-five minutes. Because the objective facts point in both directions, it cannot be said that the Ohio courts were unreasonable in their application of clearly established federal law. Cf. Mason v. Mitchell, 320 F.3d 604, 632 (6th Cir. 2003).

Accordingly, Mr. Joseph is not entitled to habeas relief on his ninth ground.

c. Improper Admission of Evidence (Grounds Thirteen, Fourteen, and Seventeen)

In his thirteenth, fourteenth, and seventeenth grounds for relief, Mr. Joseph alleges that several evidentiary rulings by the trial court deprived him of his rights to confront his accuser and to a fair trial as guaranteed by the Sixth and Fourteenth Amendments.

i. Admission of Alleged Hearsay

In ground thirteen, Mr. Joseph contends the trial court's admission of hearsay from the victim on the night of his disappearance violated his confrontation rights. Over Mr. Joseph's counsel's objection, the trial court admitted, under the present sense impression hearsay exception, the following testimony by Cara Wireman:

> Q: Okay. Did you have any conversations with [Ryan Young] about any vehicles in the area before he left?

> A: Yes, we did. As I was shutting the barn doors I had my back to the road. Ryan made the remark, . . . "That looks like the white Cutlass that Dick [Joseph] drives." I said, "I doubt that. He wouldn't be out here." Ryan said, "I'm pretty sure that was him."

(Tr. 1271-72). The Ohio Court of Appeals concluded that the trial court did not commit prejudicial error in admitting this testimony explaining in pertinent part:

> The statement made by Ryan was hearsay which, if standing alone, might lack the requisite degree of trustworthiness and thus be inadmissible under [the present sense impression] exception to the rule against hearsay. However, Cara Wireman's testimony provided sufficient guarantees of credibility to make Ryan's statement admissible at trial. Although Cara did not see the car at the precise time Ryan made the statement in question, she did testify she saw the car a few minutes later as she was closing the front door to the barn. In addition, she saw this vehicle being driven back and forth in front of her house approximately ten to twelve times.

(Ex. EP at 82-83). Mr. Joseph contends that the Ohio Court of Appeals unreasonably applied clearly established United States Supreme Court law. The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." The central concern of the Confrontation Clause is to ensure that defendants have the opportunity to subject the prosecution's evidence to cross-examination. Maryland v. Craig, 497 U.S. 836, 845 (1990). The Confrontation Clause "does not necessarily prohibit the admission of hearsay statements against a criminal defendant, even though the admission of such statements might be thought to violate the literal terms of the Clause." Bugh v.

Mitchell, 329 F.3d 496, 507 (6th Cir. 2003) (quoting Idaho v. Wright, 497 U.S. 805, 813 (1990)). However, the scope of the Confrontation Clause is more expansive than the general rule prohibiting hearsay and "bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule." Id. In Owens v. Roberts, the United States Supreme Court explained that the Confrontation Clause requires the exclusion of hearsay unless it can be shown that the declarant is unavailable and that the statement bears adequate "indicia of reliability." 448 U.S. 56, 66 (1980).[34] "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." Id.; see also Lilly v. Virginia, 527 U.S. 116, 126 and 133 (1999) (noting that such traditional hearsay exceptions as those making admissible "dying declarations" and "spontaneous declarations" are "firmly rooted" in this categorical sense, but concluding that "statements against penal interest" by an accomplice to incriminate a defendant are not). Even if the evidence does not fit within a firmly rooted hearsay exception, it still may be admitted without violating the Confrontation Clause if it contains "'particularized guarantees of trustworthiness such that adversarial testing would be expected to add little, if anything, to the statement's reliability." Lilly, 527 U.S. at 125. This residual "trustworthiness" test "credits the axiom that a

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[34] While Owens, at least with respect to testimonial evidence, was recently overruled by the United States Supreme Court in Crawford v. Washington, 124 S. Ct. 1354, 1370-74 (2004) (holding that testimonial statements of witnesses absent from trial should be admitted only "where the declarant is unavailable, and where the defendant has had a prior opportunity to cross-examine"), this Court nonetheless applies Owens because the statement at issue in this case was not testimonial. Moreover, even if the statement was testimonial as intended by Crawford, Owens would nevertheless apply because it constituted the clearly established Supreme Court precedent at the time of the relevant state court decision. See Lies v. Jackson, 100 Fed. Appx. 378, 379 (6th Cir. 2004).

rigid application of the Clause's standard for admissibility might in an exceptional case exclude a statement of an unavailable witness that is incontestably probative, competent, and reliable, yet nonetheless outside of any firmly rooted hearsay exception." Id. at 136.

In this case, the Ohio Court of Appeals did not find that the hearsay statement fit within the present sense impression exception, concluding instead that the hearsay statement may be inadmissible under this exception. Nonetheless, in finding that the trial court did not commit prejudicial error in admitting the statement, the Ohio Court of Appeals explained that the statement was sufficiently reliable due to corroborating evidence that the white Cutlass was in fact in the area. Such corroborating evidence may not, however, provide the "particularized guarantees of trustworthiness" required by the Confrontation Clause. Lilly, 527 U.S. at 137-38 (quoting Wright, 497 U.S. at 822). In Wright, the United States Supreme Court held that, to be admissible under the Confrontation Clause, "hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." Accordingly, it is entirely irrelevant whether other evidence corroborates the hearsay statement. Lilly, 527 U.S. at 137.

Removing from its consideration the other evidence which the Court of Appeals found to corroborate the hearsay statement, this Court concludes that the hearsay statement lacked the indicia of reliability necessary for admission and that the state court unreasonably applied clearly established Supreme Court precedent in permitting its admission. Nevertheless, the Court finds that the trial court's error in admitting the hearsay statement to be harmless because it did not have a "substantial or injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 637-38; Bulls v. Jones, 274 F.3d 329, 335 (6th Cir. 2001). Though Ms. Wireman did not observe the white Cutlass at the precise

time that Mr. Young saw the car, she nonetheless saw a car matching that description, approximately fifteen minutes later, drive back and forth in front of her house ten to twelve more times. (Tr. 1272 and 1278-81). While this testimony can not be used to "bootstrap" the admissibility of Ryan Young's statement, it does tend to demonstrate that the admission of the hearsay testimony did not have a substantial or injurious effect in determining the jury's verdict. Moreover, as will be seen below in analyzing Mr. Joseph's insufficiency of the evidence claims, the exclusion of this hearsay statement from this Court's analysis has no impact on its conclusions.

Accordingly, despite the constitutional error and the Court of Appeals' unreasonable application of clearly established law, Mr. Joseph is not entitled to relief on this ground because the trial error was harmless.

ii. Admission of Crime Photographs and Weaponry

In his fourteenth ground for relief, Mr. Joseph contends that trial court erred in admitting the following purportedly prejudicial evidence and that the cumulative effect of the admission of this evidence violated his procedural due process rights:

1. Six crime scene photographs (State Exs. 15-18,33, and 36) and nine autopsy photographs used during the guilt phase.

2. Two crime scene photographs used during the penalty phase (State Exs. 15 and 18).[35]

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[35] While Mr. Joseph does not specify which photos were used during the penalty phase, simply referring to them as "more gruesome autopsy photos," (Docket #83, at 105) a review of the transcript indicates that the two photographs (Ex. 15 and 18), which the trial court allowed to go to the jury, were actually two of the six crime scene photographs used during the guilt/innocence phase of the trial. (Mitigation Tr. 265-68).

3. Two matching knives in sheaths, one taken from between the seat and console of Forest's car on 5 July 1990 (State Ex. 61 A) and one obtained from the defendants' residence (originally State Ex. 61 B, admitted as a part of State Ex. 21).

(Docket #106 and #107).[36]

To the extent that Mr. Joseph challenges the technical correctness of the state court's evidentiary rulings, this Court lacks the authority to review them. Frazier v. Huffman, 343 F.3d 780, 789 (6th Cir. 2003). State trial court errors regarding the admissibility of evidence "do not rise to the level of federal constitutional claims warranting relief in a habeas action unless the error renders the proceeding so fundamentally unfair as to deprive the petitioner of due process under the Fourteenth Amendment." McAdoo v. Elo, 365 F.3d 487, 494 (6th Cir. 2004) (citing Estelle v. McGuire, 502 U.S. 62, 69-70 (1991); Payne v. Tennessee, 501 U.S. 808, 825 (1991). Accordingly, this Court reviews the state court decisions to determine whether their finding that challenged evidence was admissible violated Mr. Joseph's constitutional due process rights.

Photographs Used During the Guilt/Innocence Phase

With respect to the photographs used during the guilt/innocence phase, the Ohio Supreme Court concluded that the six crime scene photos were relevant "to corroborate

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[36] State's Exhibit 21 was a black bag containing martial arts clothing, masks, a hood, and a knife. In addition to his arguments regarding the knife admitted as a part of State's Exhibit 21, Mr. Joseph also suggests that the proper foundation was not laid for the admission of the black bag and any of its contents. (State Ex. 21). Given that Mr. Forest testified that the bag belonged to Mr. Joseph, that Mr. Joseph failed to object at trial to the admissibility of the bag or its contents other than the knife (Ex. EP at 79), that Mr. Joseph provides only conclusory statements regarding the trial court's error in admitting the bag itself, this Court addresses only the admission of the knife in its ensuing discussion.

the testimony of Inspector Daily concerning wounds inflicted on the victim" and that the autopsy photos were relevant "to corroborate the expert testimony of Dr. Amy Martin of the Hamilton County Coroner's Office." 73 Ohio St. 3d at 460. The Ohio Supreme Court also held that, although some of the photos were gruesome, their probative value outweighed any danger of material prejudice. Id. Besides challenging the correctness of the Ohio Supreme Court's evidentiary rulings, Mr. Joseph suggests that the use of gruesome and repetitive photos led to a fundamentally unfair trial. This Court disagrees finding that the admission of the multiple photos did not violate Mr. Joseph's constitutional right to a fair trial. Cf. Frazier, 343 F.3d at 789 (admission of multiple photographs of victim's corpse did not render defendant's trial fundamentally unfair).

The Knives

Mr. Joseph contends that the trial court erred in admitting two knives (Exs. 61A and 61 B) over his objections. In order to provide the proper context for considering this issue, the Court relates the portion of the trial transcript which deals with their admissibility:

> THE COURT: . . . One other issue - the question of the other weapons. Is that matter resolved? As I indicated, the Court is granting the motion in limine as to any weapons which cannot be shown to be a part of this offense by some probative evidence. Towards that end I would ask the State of Ohio whether that issue still presents a problem.
>
> MR. BERRY: In one area, your honor. We have one weapon [Exhibit 61 B] that is an exact, well, I don't want to say duplicate, but it's an exact same kind of weapon that was found in the vehicle [Exhibit 61A] that the

State intends to show the defendants were traveling. We intend to produce evidence that the pair that was involved in this each had the same kind of knife. One knife was found in a car and one knife was found in their residence. Our theory on presenting . . . the knife that was found in . . . [the] house is to show that the knife in the car belonged to these defendants and it's another piece of evidence to put them in the car.

THE COURT: Will you have evidence by a pathologist or otherwise which would indicate that the wound produced was consistent with one that may have been produced by a weapon such as that?

MR. BERRY: No. There's another knife that we contend, and the pathologist is going to say . . . is consistent with the knife that we intend to present. However, the knife in the vehicle [Exhibit 61A] was taken to the laboratory and was tested and they did find the presence of human blood. There was such an insignificant amount of blood on that knife that it was impossible to tell anything but the fact that it was human blood . . . .

THE COURT: Will the State be submitting that the knife found in the vehicle [Exhibit 61A] was in any manner used in the offense in question.

MR BERRY: That conclusion can be drawn by the jury. I can't sit here and tell you, yes, I can prove that. But, the knife was found in the vehicle. The knife was found there the

next morning. The knife was taken to the lab. The knife did have the presence of human blood . . . .

THE COURT: How many knives were found in the vehicle?

MR. BERRY: One knife [Exhibit 61A].

THE COURT: And there was one knife in the residence which was similar in nature [Exhibit 61 B]?

MR. BERRY: It was exactly identical.

THE COURT: And you're saying there was also a third knife that a pathologist will indicate may have caused the wounds; is that correct?

MR. BERRY: Yes, sir.

THE COURT: And where was that knife found?

MR. BERRY: Well, that knife was never found. What we have and what we intend to present is there was a knife in the sun visor of the car that the State claims these defendants were driving in. That knife came up missing after the night in question. The owner of that knife and the owner of the car is going to tell us that the knife was purchased by he and a friend in Columbus and when they purchased these knives a year or two ago, well, it was kind of an event they remembered, and the knives were identical. We have been able to produce the knife from Columbus that [sic] we have testimony to say that it is identical. It was made by the same company; same size; shape; everything. That knife was shown to the pathologist, who has told us

and we expect the testimony to say, that that is consistent with the wounds, the killing wound.

THE COURT: So, it would be the State's position that you will seek to have admitted three separate knives and indicate to the jury that they may draw an appropriate inference that one of these knives was used in the perpetration of the alleged crime?

MR. BERRY: One or two of the knives.

THE COURT: One being similar and . . . not being actually involved, but the other two perhaps being involved.

MR. BERRY: Right.

MR. NOVAK: We disagree with that, your Honor. The knife found at home has absolutely nothing to do with the case at all. The knife in the car is just mere supposition that it was ever used.

THE COURT: The knife found in the home, Mr. Berry, is it the State's view that that knife may have been involved in the offense.

MR. BERRY: No. The State does not contend that it was involved in the offense, but it's another link to establish that the two people in the car, one of which is [Mr. Joseph], was in that car and the knife belonged to either Bulerin or Joseph.

THE COURT: What does the knife in the residence, though, have to do, or how is that probative to the issues that would be before the jury?

Mr. BERRY: Because we know from the evidence that we intend to present . . . that each of these fellows . . . owned a knife exactly like the one that was found in the car. We contend that that's another link, having found that knife in the house is another link linking these two people as the perpetrators.

THE COURT: I'm still not seeing the probative connection, Mr. Berry . . . .

MR. BERRY: It's the State's contention that the knife found in the residence solidifies the position of the State that the knife in the car belonged to one of these fellows. The car that they were driving that night was not their car. It was a borrowed car.

THE COURT: How does finding a knife in the residence tell me or anyone else that fact?

MR. BERRY: Because we can produce a witness that can say, yes, I was in their house; yes, I know those fellows; and, yes they each had a knife identical to that. The two knives I'm talking about are fairly unique.

THE COURT: Well, the Court at this time is inclined, given appropriate testimony, to deny the motion in limine as to the knife found in the vehicle and . . . as to the duplicate knife which you obtained. As to the knife found in the residence, the Court will reserve any ruling on that matter . . . .

(Tr. 1145-51). On the following day, Assistant County Prosecutor Berry again raised the issue of the knife found in the residence, initiating the following interchange:

MR BERRY: I just want to tell you what piece of evidence I frankly discovered today. When the house

was searched part of the evidence that was taken out there was a black suitcase, a black canvas suitcase .... In that suitcase was a number of articles [including] two black masks, ... black clothes ... , ... rubber gloves ... , [and] the knife I was talking about [Exhibit 61 B]. I didn't know where that had been found . . . What I intend to do is bring that case in with all those contents in it and try to get it admitted. If I do that, then I've got the knife in the case and I don't want to run afoul your ruling.

* * *

THE COURT: [Has that case] been in the State's position the entire time?

MR. BERRY: Yes, it's not been out of our possession.

* * *

THE COURT: [Y]ou have an officer that's going to testify that the weapon was found in the suitcase?

MR. BERRY: And I found out that as late as this morning.

THE COURT: Can that case be tied to either one of the defendants?

MR. BERRY: It was in their kitchen in their house. It was where they live.

* * *

MR. WELLER: And in the house where they lived at the time was at least two other people, or three other people.

MR. BERRY: Well, the other people, I can hold out to the Court, at least the other residents are going to say that they didn't have any of that stuff.

(Tr. 1329-35).

The court took this under advisement and stated that they would revisit the issue later. (Tr. 1335).

At trial, the prosecution did not separately identify or seek to admit the knife found in the residence [State's Exhibit 61 (B)], but rather simply handled it as part of the black suitcase and its contents [State's Exhibit 21]. Detective Everett testified that, during the search of 805 East O'Connor [Joseph and Bulerin's residence] on 4 July 1990, he found the black suitcase with contents [State's Exhibit 21]. (Tr. 1367-68). Detective Everett testified that the case had been in the care and custody of the Sheriff's Department since he found it and, though he did not specifically discuss its contents on the record, he stated that the case now contained all the same contents as when he originally secured it. (Tr. 1368-71). Mr. Forest testified that the black suitcase belonged to Mr. Joseph. (Tr. 1633). Moreover, Mr. Joseph's cousin, April Joseph, who, along with her boyfriend, was living with Mr. Joseph at the time of the murder, testified that the suitcase did not belong to her or her boyfriend. (Tr. 1387, 1524-25, and 1528).

At the close of trial, defense counsel renewed their objection to "the suitcase that contains a knife" [State's Exhibit 21] explaining that:

> There's a knife there that they say is a duplicate to a knife found in the car apparently on the console - State's exhibit '61A'. The testimony revealed that that knife [Exhibit 61A] was found on July 4th, which is approximately eight days after the alleged incident.
>
> * * *
>
> [Both knives] are objectionable because they have some probative value, but so little probative value .... It was similar to the wallet that Van Horn was

> talking about that they found in the car on July the 4th, the date of the arrest. Although it has some probative value, it's very little, very little. We would find that to be prejudicial. The possibility of prejudicial effect outweighs the probative value. We're talking about eight days later that '61A' was found in the car. For that to have a link to the knife in '21', well, that just makes it that much more removed. Although it may have a scintalla [sic] of probative value we think that the prejudicial effect far outweighs it.

(Tr. 1904-1906). Despite defense counsel's objection, the trial court admitted State's Exhibit 21, the black suitcase with its contents, including the knife. (Tr. 1906). On appeal, the Ohio Court of Appeals concluded that, given the testimony of April Joseph and William Forest, a sufficient foundation was laid for the admission of the bag and its contents, including the knife, into evidence. (Ex. EP at 79).

As to State's Exhibit 61A, Detective Ketchum identified it at trial as the knife he found in between the seat and console of Mr. Forest's white cutlass, during a search conducted after Mr. Joseph was arrested, approximately eight days after the murder. (Tr. 1463-64; Ex. EP at 75). The forensic scientist testified that the knife itself had no traces of human blood but that tests indicated a small trace of human blood on inside of the sheath. (Tr. 1772-73). The blood type, however, could not be determined. (Tr. 1773). At the close of trial, Mr. Joseph's counsel objected to admission of the knife found in the car (Ex. 61A) because of the "time frame" between the date of the murder and the date of the discovery of the knife. In response, Assistant County Prosecutor Berry argued that it should be admitted because:

> There was testimony that that knife belonged to either of the codefendants, one or the other of them, from Bill Forest. There was the presence of human blood

> on that knife. There were cuts on the throat of Ryan Young. We feel that is very probative. The time difference on that, I feel, is different than the findings on the billfolds.[37]

(Tr. 1921). Notwithstanding Assistant County Prosecutor Berry's representations to the contrary, there was no evidence at trial that the knife belonged to Mr. Joseph or Mr. Bulerin or that there was human blood on the knife. Nevertheless, the trial court admitted Exhibit 61A. (Tr. 1921). On appeal, the Court of Appeals concluded that the trial court did not abuse its discretion in admitting the knife found in the car [State's Exhibit 61A]. (Ex. EP at 76) explaining that:

> Exhibit 61A was relevant to the case and was admissible into evidence for whatever weight the jury deemed appropriate. [Joseph]'s argument regarding the delay between the time of the crime and the discovery of the knife was an area that could have been explored by defense counsel's cross examination of the deputy who discovered the knife in Forest's car. The admission of this knife was not unfairly prejudicial to [Joseph].

(Ex. EP at 75-76).

On habeas review, this Court's role with respect to the oversight of state evidentiary rulings is extremely circumscribed. The Court is not reviewing the decision to

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[37] The trial court had previously denied admission of a billfold found in the car explaining:

> To make it probative you would have to, first of all, draw an inference that it had been in the car since the time of the alleged crime, and secondly make an inference that it connected the defendant because of its presence there, I think that's too distant. I'm not going to admit that exhibit.

(Tr. 1909).

admit evidence for the correctness of the ruling, nor is it even reviewing the decision for abuse of discretion. Rather, this Court's sole province is limited to a determination of whether the state court decision, in this case by the Ohio Court of Appeals, was an unreasonable application of clearly established law which provides that the improper admission of evidence violates Mr. Joseph's constitutional due process rights if it rendered the proceeding fundamentally unfair. While the two knives admitted as State Exhibit 61A and as a part of State Exhibit 21 may have a limited or tenuous connection to this case, especially Exhibit 61A which was found eight days after the murder and was never connected to either Joseph or Bulerin, it cannot be said that their admission rendered Mr. Joseph's trial fundamentally unfair.

Photographs Used During the Penalty Phase

As to the two photographs which the trial court permitted to go to the jury during the penalty phase, the Ohio Court of Appeals found that they were properly admissible because both were relevant to the aggravating circumstance of the kidnapping. (Ex. EP at 62). The Ohio Court of Appeals explained that Exhibit 15 was relevant to show that the "kidnapping was preplanned" and that Exhibit 18 was relevant "because it tended to show how the victim was held against his will." (Ex. EP at 62). Mr. Joseph objects to the admission of these exhibits claiming that "the real issue for the death penalty phase was ... whether [Joseph] was the actual killer" and the photographs had "no relevance to the lawful aggravating circumstances." (Docket #83, at 106). In advancing such an argument, Mr. Joseph errs by unduly restricting the elements of the applicable aggravating circumstance. Notwithstanding the pervasive misunderstanding of the aggravating circumstance in this case as discussed in several other of Mr. Joseph's grounds for relief, the State had to prove two elements to establish the aggravating circumstance in this case: 1) the murder was committed while Mr. Joseph was committing, attempting to

commit, or fleeing immediately after committing or attempting to commit kidnapping; and 2) Mr. Joseph was the principal offender in the commission of the aggravated murder. Because the aggravating circumstance involves both elements, evidence relevant to the kidnapping itself is admissible during the penalty phase under Ohio law. See State v. DePew, 38 Ohio 81. 3d 275, 282 (1988).

The Ohio courts' conclusion, that these photographs were relevant to the aggravating circumstance at issue in this case, was not unreasonable. As noted by the Ohio Court of Appeals, Exhibit 18 suggests that Mr. Young was held against his will and therefore constitutes pertinent evidence that the murder was committed in conjunction with a kidnapping. Exhibit 15, which showed the victim wrapped in a piece of heavy plastic or visqueen, arguably provides some evidence that Mr. Joseph was the principal offender in the commission of the aggravated murder. As the visqueen is one piece of evidence which directly tied Mr. Joseph to the murder, it has relevance to the requisite finding that Mr. Joseph was the principal offender in the commission of the aggravated murder.[38] Moreover, even if the trial court erred in admitting Exhibit 15 during the penalty phase, such error was harmless given that Exhibit 15 had already been presented to the jury during guilt/innocence phase. Accordingly, the photographs used during the penalty phase did not render Mr. Joseph's trial fundamentally unfair.

iii. Admission of "Expert" Testimony

In his seventeenth ground for relief, Mr. Joseph contends that his due process rights were violated when the trial court allowed Detective Ketchum's opinion testimony comparing two photographs of tire imprints taken from the scene of the

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[38] The Court of Appeals' suggestion that Exhibit 15 was relevant because, in conjunction with other evidence, it tends to show that the kidnapping was preplanned was erroneous because premeditation was not an element of the aggravating circumstance.

abduction [State's Exhibits 36A and 36B] with tread of the tire from the car allegedly used by Mr. Joseph on the night of the murder [the tire was State Exhibit 36C]. (Docket #83, at 120). While Mr. Joseph argues that such testimony was improper because Detective Ketchum was not qualified to testify as an expert and his opinions were not given with a reasonable degree of scientific certainty, both the trial court and the Ohio Court of Appeals concluded that his testimony constituted appropriate lay opinion testimony. (Ex. EP at 68-70).

During the trial, after Detective Ketchum had identified the three exhibits and began to testify about the investigation he conducted with respect to the tire, defense counsel objected to "any opinion offered by [Ketchum] as to the comparison of the tire tracks unless it's first established through further foundation that he is an expert and has sufficient training to make those comparisons." (Tr. 1441-44). Noting defense counsel's objection, the trial court explained that this was an area for cross-examination and that he was going to permit Detective Ketchum's testimony on whether there were any similarities based on his visual observations. (Tr. 1446). Detective Ketchum's testimony proceeded as follows:

> Q: Sergeant, I was asking about what investigation or what involvement you had with State's exhibit '36C' and State's exhibits '36A and B'.
>
> A: [I compared] ... the photographs which were taken of the tire tracks on Thayer Road ... with the tire and the tire tread pattern is that similar to the tire tread pattern in the photographs which I had taken.
>
> Q: What do you mean by the tire tread patterns?
>
> A: The tread pattern. Each company makes tires and they put a different tread pattern in them. These tires have a definite distinct pattern, along with the

photographs which I took have that same distinct type pattern.

Q: Is there anything unique about State's exhibit '36C' that you made specific note of?

A: Yes, sir, I did. As you can see on the tire itself, in the center of the tire, you'll see a wear mark right where you have your finger now. Comparing it to the photograph ... you'll see that same wear pattern in the center of the tire track. Also, the tread on the side of the tire is similar to the photograph.

Q: Are you telling the jury that that tire made that track?

A: I can't say that. I'm not a lab tech. I can't say that. I'm saying that tire is similar to the photographs that I took at the scene.

(Tr. 1448-49). Subsequently, Mr. Joseph's counsel addressed this topic on cross-examination, obtaining testimony from Detective Ketchum that he did not take plaster imprints of the tire marks, that such imprints may permit a more accurate comparison than a visual inspection, and that he could not state with any certainty that the tire is the same one which left the imprints in the photographs. (Tr. 1471-73). On redirect, Detective Ketchum reiterated that, based on his visual observations, the tire imprint in the photographs and the tire itself had similar tread design and pattern. (Tr. 1473-74).

On appeal, the Ohio Court of Appeals found no error in permitting the admission of Detective Ketchum's testimony as a lay opinion because it was rationally based on his perceptions given that the tread pattern was sufficiently large and distinct so as to obviate the need for detailed measurements or subtle analysis and was helpful to a clear understanding of his testimony or the determination of a fact in issue. (Ex. EP at 70). Noting the limited nature of his

testimony, the Court of Appeals pointed out that he did not testify about the results of any scientific test or offer any conclusions, but rather simply pointed out readily recognizable similarities between the tire and the tire tracks.

(Ex. EP at 70).

On habeas review, this Court is not confronted with the question of whether Detective Ketchum gave improper lay opinion testimony, but rather must only consider whether, assuming such testimony was improper, the Court of Appeals unreasonably applied clearly established Supreme Court precedent in failing to find that the admission of such testimony rendered Mr. Joseph's trial fundamental unfair. As it evident from a careful review of the case that Detective Ketchum's testimony did not render Mr. Joseph's trial fundamentally unfair, Mr. Joseph's seventeenth ground for relief lacks merit.

d. Denial of Right to Be Present at All Proceedings (Ground Fifteen)

In ground fifteen, Mr. Joseph contends that his constitutional rights were violated when he was excluded from numerous chambers conferences. (Docket #83, at 112-13). On appeal, the Court of Appeals concluded that, even assuming that Mr. Joseph had a right to be personally present at the chambers conferences "his absence was harmless beyond a reasonable doubt." (Ex. EP at 67). Both the Due Process Clause of the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment provide the constitutional foundation for a criminal defendant's right to be present during certain proceedings related to his criminal prosecution. Of the two constitutional sources, the right to be present generated by the Confrontation Clause is more clearly delineated. The Confrontation Clause guarantees the "accused's right to be present in the courtroom at every stage of his trial." Illinois v. Allen, 397 U.S. 337, 338 (1970); Maryland v. Craig, 497 U.S. 836, 844 (1990) (explaining that

the Confrontation Clause "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.") With respect to the Confrontation Clause, the relevant inquiry is "whether there has been any interference with the defendant's opportunity for effective cross-examination." Kentucky v. Stincer, 482 U.S. 730, 744 n.17 (1987). Given the scope of the Confrontation Clause's protection and the nature of the chambers conferences, it is evident that defendant's Sixth Amendment right to "be confronted with the witnesses against him" was not implicated in this case.

While the defendant's right to be present during proceedings is principally rooted in the Confrontation Clause, the United States Supreme Court has recognized that the Due Process Clause protects the right to be present "in some situations where the defendant is not actually confronting witnesses or evidence against him." U.S. v. Gagnon, 470 U.S. 522, 526 (1985). However, the companion protection afforded by the Due Process Clause is more nebulous. In Snyder v. Massachusetts, the Supreme Court explained that, "so far as the Fourteenth Amendment is concerned, the presence of the defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." 291 U.S. 97, 107-108 (1933); see also Stincer, 482 U.S. at 745. In other words, a defendant is "guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." Stincer, 482 U.S. at 745. The United States Supreme Court has declined to extend this right in several contexts. Stincer, 482 U.S. at 745 (no right to be present during hearing to determine competency of prosecution's key witnesses); Snyder, 291 U.S. at 122 (no right to be present when the jury was taken to view the crime scene); Gagnon, 470 U.S. at 526 (no right to be present during an in camera discussion between a judge and a juror).

Mr. Joseph has not identified, and this Court has not found, a single United States Supreme Court case indicating that a defendant has a constitutional right to be present at any or all chambers conferences. Though Stincer, Snyder, and Gagnon do not directly address the issue of chambers conferences, their combined logic dictates that criminal defendants, at most, have a constitutional right to be present at chambers conferences only if: 1) the conference is critical to the outcome of their criminal proceeding, and 2) the defendants' absence would somehow thwart their right to a fair and full hearing.[39]

Even assuming that Mr. Joseph had a clearly established constitutional right to be present during chambers conferences which meet the criteria set forth above, the Ohio Court of Appeals did not unreasonably apply this law in finding that Mr. Joseph was not prejudiced in this case. Most of the chambers conferences dealt with legal or procedural matters which were not critical to the outcome of the trial and/or the resolution of which were not undermined by the absence of Mr. Joseph. The most significant chambers conferences from which Mr. Joseph was absent involved discussions of the jury instructions. (Tr. 1926-1966; Mitigation Tr. 1-20 and 187-202) and responses to jury questions. With respect to jury instructions, several circuit courts have held that defendants do not have a constitutional right to be present during a chambers conference "dealing only with the legal questions involved in formulating a proper set of jury instructions." U.S. v. Rubin, 37 F.3d 49, 54 (2nd Cir. 1994); Larson v. Tansy, 911 F.2d 392, 395 (10th Cir.1990); Jones v. Dugger, 888 F.2d 1340, 1343 n.3 (11th Cir. 1989); U.S. v. Graves, 669 F.2d 964, 972-73 (5th Cir.

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[39] Prior to Stincer and Gaanon, the Sixth Circuit had broadly stated that defendants do not have a constitutional right to be present during chambers conferences. U.S. v. Brown, 571 F.2d 980, 986-87 (6th Cir. 1978) (no right to be present during a chambers conference concerning the dismissal of a juror).

1982); Root v. Cunningham, 344 F .2d 1, 3 (4th Cir. 1965).[40] Accordingly, Mr. Joseph's absence from the chambers conferences discussing the formulation of jury instructions did not implicate due process concerns.

In Pearson v. Morris, an unreported decision, the Sixth Circuit directly addressed chambers conferences held to discuss responses to jury messages or questions. 1990 WL 200307, at *3 (6th Cir. Dec. 12, 1990). Consistent with the teachings of Stincer, Snyder, and Gagnon, the Pearson court held that a defendant is constitutionally entitled to be present during a discussion in which a reply to a jury question is formulated if "it was 'the sort of question on which counsel would be likely to consult their clients, or on which the clients, if consulted, would be likely to have an answer that would sway the judge.'" Id. (quoting U.S. v. Silverstein, 732 F.2d 1338, 1348 (7th Cir. 1984)).

Assuming that the constitutional test applied in Pearson was a logical extension of Supreme Court due process precedent, the Ohio Court of Appeals did not unreasonably apply this test because the jury questions in this case were quite innocuous, because the questions were unlikely to be of the kind which counsel would consult with his or her client, and because the answers themselves were fairly benign.[41]

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[40] In U.S. v. Rhodes, the Fourth Circuit concluded that Root's holding that criminal defendants had no right to be present during jury instruction conferences was partially abrogated in the federal context by the United State Supreme Court's holding in Rogers v. U.S., 422 U.S. 35 (1975) concerning Fed. R. Crim. P. 43(a). 32 F.3d 867,873-74 (4th Cir. 1994).

[41] Only one question was asked by the jury during the guilt/innocence phase of the trial: "We, the jurors, would like to know if we are permitted to review transcripts of one, Cara Wireman, and two, April Joseph. Richard Joseph's statements - (all of them)." (Tr.2081). To which the judge responded in writing, "No, you must rely upon testimony which you have heard and the exhibits which have been introduced." (Tr. 2081-82).

In conclusion, the Confrontation Clause was not implicated by the chambers conferences held in this case. Moreover, even assuming a criminal defendant had a due process right to be present at certain chambers conferences, the Ohio Court of Appeals' conclusion that Mr. Joseph suffered no prejudice from being absent from these proceedings does not constitute an unreasonable application of the law governing this right.

e. Failure to Properly Conduct In Camera Inspection of Witness Statements (Ground Eighteen)

As noted above, Mr. Joseph procedurally defaulted his eighteenth ground for relief by failing to present it on his

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During the penalty phase of the trial, the following questions were asked and written responses were qiven:

Question #1: "Can we get a dictionary"

Answer: "No. You must rely upon the evidence which you have heard or seen, and the instructions given to you by the Court."

(Mitigation Tr. 338-39).

Question #2: "Dear Judge Basinger. We cannot get a verdict at this time. We would like to call it a day and return tomorrow morning with your okay."

Response: The trial court excused them for day.

(Mitigation Tr. 339-42).

Question #3: "Dear Judge Basinger. We are deadlocked at this time. One, what happens if this cannot be changed? Two, how long before the [sic] affects the trial itself. Thank you for any help (direction) you may be able to give us within the rules of the law." (Mitigation Tr. 345).

Answer: "There are no time limits on the length of your deliberations. You must rely upon the instructions of law previously given to you." (Mitigation Tr. 351-52).

initial appeal. Accordingly, the Court does not reach the merits of this claim.

4. Ineffective Assistance of Counsel: Eighth Ground for Relief

In his eighth ground for relief, Mr. Joseph argues that he was denied effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments. (Docket #83, at 79). Although several of Mr. Joseph's "sub-claims" have been procedurally defaulted, this Court addresses the merits of the following non-defaulted ineffective assistance claims raised by Mr. Joseph's petition:

- Trial counsel's failure to recognize the invalid capital specification in the indictment, to object to it at any time, and to object to the erroneous jury instructions regarding the capital specification at both guilt/innocence and penalty phases of trial. (Docket #83, at 79-81).
- Trial counsel's voir dire errors. (Docket #83, at 81-83).
- Trial counsel's disparaging remarks about his client in front of the court and the prosecutor. (Docket #83, at 85).
- Trial counsel permitted the State to divulge claimed details concerning plea negotiations to the judge. (Docket #83, at 85).

After briefly reiterating the clearly established law related to ineffective assistance of counsel claims, the Court addresses each of these four sub-claims in turn.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court formulated the standard for ineffective assistance of counsel that was applicable during Mr. Joseph's state appeals and remains applicable today. In

Strickland, the United States Supreme Court explained that the

> [B]enchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [or capital sentencing proceeding] cannot be relied on as having produced a just result.

466 U.S. at 686-687. A violation of the right to effective assistance of counsel has two components: deficient performance and resulting prejudice to the defendant. Id. at 687-88; Wiggins v. Smith, 539 U.S. 510, 521 (2003). It is generally appropriate to assess counsel's overall performance when determining whether counsel provided effective assistance. Kimmelman v. Morrison, 477 U.S. 365, 386 (1986).

To demonstrate that counsel's performance was deficient, the defendant must show that "counsel's representation fell below an objective standard of reasonableness . . . [under] prevailing professional norms." Strickland, 466 U.S. at 687-688. In assessing the counsel's performance, courts must consider the specific acts or omissions of counsel and determine whether they were "outside the wide range of professionally competent assistance." Id. at 689-90. The Supreme Court cautioned, however, that "[j]udicial scrutiny of counsel's performance must be highly deferential" and that "a defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 688-89. "[S]trategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Id. at 690.

In order to establish prejudice from counsel's deficient performance, the defendant must establish that the errors committed "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. To

establish "prejudice" under Strickland, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. In other words,

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence ... the question is whether there is a reasonable probability that, absent the errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 695.

Unless a defendant demonstrates both deficient performance and prejudice, "it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. Id. at 687. Federal courts may address either the performance or prejudice element if one is dispositive. Id. at 697. Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to AEDPA's presumption of correctness, ultimate decisions on the performance and prejudice components are mixed questions of law and fact that are not entitled to this presumption. Abdur'rahman v. Bell, 226 F.3d 696, 702 (6th Cir. 2000). "There is no question that Strickland qualifies as clearly established federal law under AEDPA." Wickline v. Mitchell, 2003 WL 193437, * 2 (6th Cir. 2003).

a. Voir Dire

Mr. Joseph cites a litany of purported mistakes made by his trial counsel during voir dire. Applying the Strickland test, the Ohio Court of Appeals concluded that none of the alleged errors "either individually or collectively, meet the test for ineffective assistance of counsel." (Ex. EP at 60). Upon review of the record, this Court concludes that the Ohio Court of Appeals' decision was not an unreasonable application of clearly established federal law. None of these alleged errors infected the voir dire process or the jury which was ultimately selected so as to cause prejudice Mr. Joseph as contemplated by Strickland.

b. Disparaging Remarks

Citing pages 188 and 189 of the penalty phase transcript, Mr. Joseph argues that his counsel was ineffective in that he made disparaging comments about his client in front of the judge and the prosecutor during a chambers conference. (Docket #83, at 85). The Ohio Court of Appeals did not find the remarks to be disparaging and concluded that, in any case, Mr. Joseph suffered no prejudice as a result. Such a conclusion was not an unreasonable application of Strickland's ineffective assistance test.

c. Plea Details

Mr. Joseph argues that his trial counsel was constitutionally ineffective because he allowed the State to "divulge claimed details concerning plea negotiations to the judge who would ultimately determine whether Joseph would live or die." (Docket #83, at 85). During a conference outside the hearing of the public, Defense Counsel Novak indicated to the trial court that "there has been a plea bargain, a very important plea bargain that has been offered to the defendant" and asked to put that on the record, along with their recommendation that the defendant take the agreement

and the defendant's refusal to do so. (Ex. DO at 2). At the point, the following interchange occurred on the record:

> MR. NOVAK: Your Honor, the nuts and bolts of the plea bargain negotiations was that the prosecution would recommend a non-death penalty for a plea to the indictment and that the Court had accepted that negotiation. Our client then has refused that negotiation .... Richard ... [d]o you understand what the plea bargain negotiation is?
>
> DEFENDANT: Yes.
>
> MR. NOVAK: Have both Mark Weller and myself recommended this plea bargain to you?
>
> DEFENDANT: Yes.
>
> MR. NOVAK: Are you in any way dissatisfied with our representation to this point.
>
> DEFENDANT: No.
>
> MR. NOVAK: And your decision to turn this plea bargain down is strictly against our advice?
>
> DEFENDANT: Yes.
>
> MR. NOVAK: One hundred percent?
>
> DEFENDANT: Yes.

(Ex. DD at 3-4).[42] While the Ohio Court of Appeals did not explicitly address this issue, it is apparent that this argument lacks merit. As Mr. Joseph does not identify a single case

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[42] Citing Ex. EF at 245, Mr. Joseph also claims that defense counsel allowed the State to "divulge claimed details concerning plea negotiations" to the trial judge. In its independent review of the record, this Court did not find the interchange to which Mr. Joseph refers.

that suggests that discussing plea negotiations with the trial court amounts to ineffective assistance of counsel, this Court does not further consider this claim.

d. Invalid Specification in the Indictment and Jury Instructions

Mr. Joseph's primary ineffective assistance of counsel argument concerns his counsel's failure to object at any point to the invalid specification and his related failure to object to erroneous jury instructions based on that flawed indictment. (Docket #83, at 79-81). The Ohio Court of Appeals summarily dismissed Mr. Joseph's argument regarding his counsel's failure to object to the erroneous jur instructions and concluded that defense counsel's failure to notice the flawed indictment did not rise to the level of deficient performance, explaining that:

> The flaw in the specification is very technical in nature, albeit the effect of this flaw has been an issue of significant importance to the case. This flaw in the precise wording of the specification was so subtle that neither the attorneys for the State nor the trial judge noticed it.

(Ex. EP at 59).

In excusing Mr. Joseph's procedural default of erroneous jury instruction claim (ground two), this Court already concluded that Mr. Joseph's counsel was constitutionally ineffective in failing to object to an instruction on the death penalty specification which incorrectly described the applicable aggravating circumstance. When the Court considers this deficient performance in conjunction with his counsel's related failure to object to the flawed indictment itself and his fundamental misunderstanding of the death penalty specification itself, it becomes apparent that the Ohio Court of Appeals unreasonably applied Strickland in finding no constitutional violation.

In deciding that Mr. Joseph's counsel's failure to notice the flawed indictment did not constitute constitutionally ineffective assistance of counsel, the Ohio Court of Appeals rested solely on its conclusion that the failure to notice the error was not deficient performance due to the "technical" and "subtle" nature of the flaw. This Court disagrees with that characterization of the flaw and finds that a rudimentary understanding of Ohio's death penalty law combined with a reasonable examination of the indictment would necessarily expose the error.[43] Moreover, in reaching its conclusion, the Ohio Court of Appeals treats the deficient performance as limited to the trial counsel's failure to notice a minor, almost clerical error. In fact, however, the failure to notice the flaw is simply one manifestation of Mr. Joseph's trial counsel's basic misconception of the charges levied against Mr. Joseph and their failure to force the State to prove beyond a reasonable doubt the elements required by the correct death penalty specification.

His counsel's fundamental failure was to allow the prosecution to try Mr. Joseph on the mistaken premise that it did not matter whether Mr. Joseph was the actual killer and to permit the jury to receive erroneous instructions that Mr. Joseph could be guilty of the death penalty specification without the jury finding beyond a reasonable doubt that he was the principal offender in the commission of the aggravated murder. In the State's closing argument during

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[43] Both the Ohio Court of Appeals and the State insist that this oversight was reasonable, pointing out that neither the trial court, nor the prosecuting attorneys apparently noticed the error either. However, the mere fact that multiple attorneys purportedly failed to notice the same basic error does not automatically immunize defense counsel from charges of ineffective assistance. Moreover, this assumption that error was so subtle as to avoid discovery by a reasonably competent lawyer contradicts the basic assumption of the Ohio Supreme Court that everyone knew the correct specification in this case.

the guilt phase, Assistant County Prosecutor Berry made the following critical argument:

> Another thing the State of Ohio doesn't know and can't tell you, and it doesn't make any difference as long as you find the two people, Jose Bulerin and Richard E. Joseph, jointly committed these crimes, or this crime, the law is very clear in Ohio that if one person is an aider and abetter, no matter what part he has in it, if he plays a part in the commission of that crime then he's as guilty as the other guy. The State of Ohio can't tell you. I wish I could. I wish I could tell you exactly what happened. I don't know who struck the death blow. But, I believe the evidence is very clear that it was one of the two that's charged here. If you find one of them did it, or the other one did it, they're both just as guilty as if each of them had their hands around the hilt of that knife when it was stuck in Ryan Young.

(Tr. 1976). Defense counsel did not challenge that statement in his own closing argument and at no point did he say that, in order to convict Mr. Joseph of the death penalty specification, the jury had to find that he was the principal offender in the commission of the aggravated murder. Rather, he offered this somewhat vague statement of what the jury could find:

> If you find Richard guilty, you may find him guilty of aggravated murder with a specification of kidnapping. You may find him guilty of not the kidnapping, and just the aggravated murder. You may find him guilty of just murder. Finally, you may find him guilty of manslaughter.

(Tr. 2032). Defense counsel concluded by emphasizing the evidence that supported a finding of voluntary manslaughter. (Tr. 2032-33). On rebuttal, the State again emphasized that:

> We don't have to show that this defendant was the one who administered the fatal blows. He was with him. We don't know which one did it. We don't have to prove that.

(Tr. 2042). Defense counsel's failure to seriously challenge the prosecution regarding the applicability of the death penalty specification and marshal an obvious defense to it constitutes deficient performance. This deficient performance was further amplified by defense counsel's failure to object to erroneous jury instructions given by the trial judge at both the guilt/innocence and penalty phases of the trial. In short, constitutionally deficient performance was manifest in defense counsel's failure to understand the death penalty specification, to object to a flawed indictment which incorrectly delineated the specification, to make cogent arguments challenging its application in this case, to object to erroneous instructions concerning the specification at both the guilt/innocence and penalty phases of the trial, and to object to a verdict form which materially differed from the indictment and constructively amended the charges against Mr. Joseph. Such failures fall well below the objective standards of reasonable performance. The Ohio Court of Appeals' conclusion to the contrary was an unreasonable application of the first part of the Strickland test.

As to prejudice, the Ohio Court of Appeals did not explicitly address this issue though it did so implicitly in rejecting Mr. Joseph's other grounds for relief related to the death penalty specification. This Court finds, to the contrary, that defense counsel's deficient performance resulted in extreme prejudice to defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. Having concluded elsewhere in this opinion that Mr. Joseph's constitutional rights were violated as a result of the flawed indictment, the erroneous instructions, and the resulting death sentence, it is

evident, given the deficient performance of his counsel outlined above, that Mr. Joseph's "death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Id. at 687. Because the Court of Appeals' conclusion to the contrary was an unreasonable application of the law, Mr. Joseph is entitled to relief on his claim for ineffective assistance of counsel. Because the constitutional ineffectiveness of Mr. Joseph's counsel solely involved the death penalty specification, his entire conviction need not be reversed but rather just the finding of guilt on the death penalty specification and the imposition of the death sentence.

5. Prosecutorial Misconduct: Fourth and Fifth Grounds for Relief

In his fourth and fifth grounds for relief, Mr. Joseph charges that his constitutional rights were violated because the State withheld material exculpatory evidence (ground four) and because of a pattern of prosecutorial misconduct throughout both phases of his capital trial (ground five).

a. Failure to Disclose Exculpatory and Impeachment Evidence

In his fourth ground for relief, Mr. Joseph claims that the prosecution unconstitutionally failed to disclose favorable evidence to him, as required by Brady v. Maryland, 373 U.S. 83 (1963) and its progeny. Specifically, he contends that the State withheld information that it was constitutionally required to disclose related to three witnesses - William Forest, Cara Wireman, and Monte Stinebuck.

In Brady, the U.S. Supreme Court held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87. A Brady violation consists of three components: 1)

evidence favorable to the petitioner; 2) the government suppressed the evidence; and 3) defendant was prejudiced as a result. Strickler v. Greene, 527 U.S. 263, 281-82; Esparza v. Mitchell, 310 F.3d 414, 424 (6th Cir. 2002). The Brady rule encompasses both exculpatory and impeachment evidence. United States v. Bagley, 473 U.S. 667, 676 (1985). The failure to disclose such evidence is "material" and "prejudicial" under Brady "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 682. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a verdict worthy of confidence." Strickler, 527 U.S. at 289-90. A Brady claim does not require a showing that the introduction of exculpatory evidence would have rendered the overall evidence insufficient to convict. Kyles v. Whitley, 514 U.S. 419, 434-35 (1995). Materiality pertains to the issue of guilt or innocence, and not to the defendant's ability to prepare for trial. U.S. v. Agurs, 427 U.S. 97, 112 n.20 (1976). When assessing materiality, the Court evaluates the omissions in light of the overall record and considers the cumulative effect of all suppressed evidence. Kyles v. Whitley, 514 U.S. 419, 421, 436 (1995); U.S. v. Agurs, 427 U.S. 97,112 (1976); Castleberry v. Brigano, 349 F.3d 286, 291 (6th Cir. 2003). "[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." Agurs, 427 U.S. at 112.

There is no Brady violation "where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information or where the evidence is available ... from another source, because in such cases there s really nothing for the government to disclose." Coe v. Bell, 161 F.3d 320, 344 (6th Cir. 1998) (internal citation and quotations marks omitted). Moreover, Brady

violations are not subject to harmless error review because the Brady analysis necessarily involves a determination that the evidence at issue might have affected the verdict. Kyles, 414 U.S. at 435.

i. General Requests for Exculpatory and Impeaching Information

Prior to trial, Mr. Joseph requested from the prosecution "all evidence known or which may become known to the prosecuting attorney favorable to defendant or material to either his guilt or punishment" and specifically sought witness statements discoverable under Brady. (Ex. AA, at 2, and BL). In his motion for disclosure of impeaching information, Mr. Joseph sought impeaching information including:

> [A]ny and all consideration or promises of consideration ... including but not limited to immunity grants ... assistance or favorable treatment with any criminal, civil, or administrative dispute ... and anything else which could arguably create an interest or bias in the witness in favor of the State or against the defense or acts as an inducement to testify or to color testimony ....

(Ex. BC). The State, in responding to defendant's demand for disclosure of evidence favorable to defendant, simply stated "None." (Exhibit DB).

ii. Monty Stinebuck and Cara Wireman

Mr. Joseph argues that the prosecution committed Brady violations in failing to disclose that Cara Wireman was subjected to a hypnotic interview and that Monte Stinebuck "was led to believe that he would receive reward money for his cooperation." (Docket #83, at 43-44; Exs. PSJJ, PSKK, and PSLL). Because these claims were not fairly presented to Ohio appellate courts, the State argues that they have been procedurally defaulted. Defendant does not seriously

challenge that contention and a review of the record confirms it.

However, Mr. Joseph may be excused from that procedural default if he can establish cause and prejudice. Cause is easily established as the factual basis of Mr. Joseph's Brady claims related to Ms. Wireman and Mr. Stinebuck were "reasonably unknown" to Mr. Joseph's trial counsel and were not established until discovery in this habeas proceeding. Jamison v. Collins, 291 F.3d 380, 388 (6th Cir. 2002) (citing Amadeo v. Zant, 486 U.S. 214, 222 (1988)); Banks v. Dretke, 124 S. Ct. 1256, 1272 (explaining that a petitioner establishes cause by demonstrating that "the reasons for his failure to develop facts in state-court proceedings was the State's suppression of relevant evidence"). In order to establish prejudice to excuse the procedural default of a Brady claim, defendants must establish that the withheld evidence is "material" within the meaning of the Brady analysis. Banks, 124 S.Ct. at 1272; Strickler, 527 U.S. at 282; Jamison, 291 F.3d at 388 (explaining that for Brady claims "the procedural default prejudice analysis parallels materiality analysis under Brady.")

Mr. Joseph has failed to establish the "materiality" of this information. With respect to Monte Stinebuck, it is not even clear that there was any Brady material to turn over as there is little, if any, evidence that he expected a reward in exchange for his testimony. There is absolutely no evidence suggesting that Ms. Wireman's testimony was affected by her hypnosis session or that Mr. Stinebuck's testimony was colored by an expectation of reward. Moreover, it is not reasonably probable that had evidence been disclosed to the defense, the result of the proceeding would have been different. Accordingly, Mr. Joseph was not prejudiced by the non-disclosures related to Mr. Stinebuck and Ms. Wireman and these claims are procedurally defaulted.

iii. William Forest

Mr. Joseph's Brady claim involving William Forest can best be analyzed in two stages, starting with the State's initial failure to disclose its grant of immunity to Mr. Forest, a claim presented to the Ohio Court of Appeals and Ohio Supreme Court, and then turning to other allegedly exculpatory and impeaching evidence that the prosecution allegedly failed to disclose.

Mr. Forest's Immunity

Mr. Joseph contends that the State committed a Brady violation by not disclosing that it had granted William Forest immunity until after it came out on cross-examination. In addition to their general requests for exculpatory and impeaching information, defense counsel, at a 28 September 1990 pre-trial hearing, requested any impeaching information, asserted the belief that Mr. Forest had received "some type of consideration immunity," and stated that they had not yet received anything about Mr. Forest. (Ex. AI, at 13). The State responded that "it's incumbent upon the State to provide that information" and "[w]e fully intend to do that." (Ex. AI, at 13). Notwithstanding this representation, the State did not disclose that Mr. Forest had actually been granted immunity two months earlier at a formal hearing attended by County Prosecutor Bowers, nor did the State ever provide that information to the defense prior to trial. (Tr. 1696 and 1817).

During cross-examination of Mr. Forest by Defense Counsel Novak, the following exchange took place:

Q: Now, Mr. Forest, on July 4th of 1990 were you taken into custody into the jail?

A: Yes.

Q: Did you hire attorneys to represent you, or your mother or your stepfather hired attorneys to represent you?

A: We have two attorneys on retainers.

Q: Okay. What are their names?

A: Larry Minnard and Paul Rizor.

Q: Did they work out some type of deal, or negotiate, or in any way give you some consideration for giving a statement?

A: I was told anything I said would not be held against me.

Q: You were given immunity then from any future --

A: Yes.

(Tr. 1647-48). At this point, defense counsel told the trial judge that "we have a serious problem" and the trial judge held a sidebar conference, asking the prosecuting attorneys about any agreement they had with Mr. Forest:

THE COURT: What was the agreement?

MR. BOWERS: He was told if he - well, what happened was he gave a statement and we gave him conditional immunity that he told the truth and we found out he wasn't involved and he didn't really need it.

MR. BERRY: He was not given immunity. He was told that he wouldn't be pursued farther [sic] as long as what he told us was correct. Everything he told us checked out; proved out. So, it's not a matter of immunity. That might be his interpretation of what the deal was, but that really wasn't --

THE COURT: So, there was no immunity as such?

MR. BOWERS: I think you might call it conditional immunity. You know, if he told the truth, nothing was going to happen. I don't know how you would view that.

MR. BERRY: I guess that's pretty much what you would tell anybody - if this is true, then we're not going to follow you up on anything. What he told us, well, we felt it was true and everything he told us checked out.

* * *

MR. WELLER: We had asked on several occasions if there had been any grant of immunity or any deals struck with him and we have never gotten any response.

* * *

MR. BERRY: I guess I'm having problems with the immunity thing here. He was never told that he would not be further prosecuted on this if we found out that what he told us was a lie. I don't see how you can call that immunity. Immunity is when you say you give me a statement and no matter what the statement is, we're not going to prosecute you. He was never told that.

MR. BOWERS: I may have used the term conditional immunity.

MR. BERRY: I don't even know if there is a term like that. But, immunity is where you're told that you won't be further prosecuted. He was never told that. If you lied and we find out you had some part in this, or what you've told us is not true, then you're going to be prosecuted. That's what he was told.

(Tr. 1649-54). Defense counsel moved to strike Mr. Forest's testimony as a sanction for the State's non-disclosure and also moved for a mistrial. (Tr. 1652-53). The trial court denied both motions. (Tr. 1654). Defense counsel then completed the cross-examination.

During a chambers conference later that same day, the trial judge further pursued this issue:

> THE COURT: Mr. Bowers, was there an immunity hearing for Mr. William Forest?
>
> MR. BOWERS: Could have been. Till you mentioned this - I'm trying to search my memory, Judge, and I can't recall.
>
> THE COURT: It has been represented to me that there was such a hearing. The documents are being pulled. Do you have any recollection of such a hearing?
>
> MR. BOWERS: There could have been. I don't know. I could have even been there. I'm trying to search my memory. I know I had communications with both defense counsel - Bill Forest's counsel.
>
> THE COURT: There are some documents signed by you, Mr. Bowers, on the 6th of July. Do you remember those?
>
> MR. BOWERS: I don't remember those. Let me see them.
>
> THE COURT: Do you remember a request for an Order requiring witness for information, or to produce information, that was signed by you?
>
> MR. BOWERS: That's my signature, your Honor.
>
> THE COURT: Why wasn't this matter disclosed to the Court when I asked you directly what discussions were had about immunity?
>
> MR. BOWERS: Judge, I had quite a few discussions with Larry Minnard and with Paul Rizor.
>
> THE COURT: Are you saying that you don't remember this hearing, Mr. Bowers?

> MR. BOWERS: I do now. I did not at that time, your Honor.
>
> THE COURT: Are you saying when I asked you the question you didn't remember having this hearing, making this request, and signing these documents.
>
> MR. BOWERS: That's correct.
>
> THE COURT: Well, that's difficult for this Court to believe.

(Tr. 1695-96)[44] At this point, the Court took the defense counsel's renewed motion for a mistrial under advisement and ordered the State to turn over its entire file - "all materials" - concerning William Forest, that Mr. Forest be made available for deposition "between now [Friday, 18 January 1991] and Tuesday at the request of the defense," and that defense counsel would be given the opportunity to recall Mr. Forest if they so chose. (Tr. 1704 and 1750-53).

On 22 January 2004, defense counsel conducted a deposition of Mr. Forest. (Tr. 1836-65). After the conclusion of the deposition, counsel for both sides argued defendant's motion for a mistrial. (Tr. 1869-79). After considering applicable case law, written briefs submitted by both sides, and arguments by counsel, the trial judge denied defense counsel's motion for a mistrial and motion to dismiss explaining that:

> the remedial measures actually put defense counsel in a better position for the cross examination of the witness. The defendant has simply not suffered any prejudice on this matter.

(Tr. 1884 and 1887). In the course of issuing its ruling, the trial judge emphasized the remedial actions it had taken

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[44] Assistant County Prosecutor Berry continued to state that he had no knowledge of the hearing and asserted that he never discussed the matter with County Prosecutor Bowers. (Tr. 1697-98).

which included providing Mr. Forest's forty-two page witness statement, immunity documents, and grand jury transcript and permitting the deposition of Mr. Forest. (Tr. 1880 and 1885). In its charge to the jury, the trial court did not specifically refer to Mr. Forest but did give the jury the following instruction on immunity:

> If you find that immunity has been granted to any witness, the credibility of such testimony must be examined with greater scrutiny than testimony of an ordinary witness.

(Tr. 2057-58).

Though it addressed the State's delayed disclosure of Mr. Forest's immunity in the context of an alleged violation of Rule 16(B)(1)(f) of the Ohio Criminal Rules of Procedure, the Supreme Court of Ohio implicitly addressed the constitutional concerns raised by the State's action when it concluded that:

> [T]here is nothing in the record to indicate that had the fact of immunity or even the substance of Forest's testimony been disclosed prior to trial, the result of the proceeding would have been different. Moreover, while the evidence was not disclosed to the defense prior to trial, it was disclosed during trial. The record reflects the trial court took many remedial measures at that time to ensure the fairness of the proceedings, including notifying the jury of the immunity upon the defense's cross-examination of Forest, and, at the end of trial, admonishing the jury that the credibility of a witness to whom immunity had been granted must be examined with greater scrutiny. Thus, since there is no evidence that appellant suffered any prejudice from the initial nondisclosure of the information, proposition of law number two is without merit.

Joseph, 73 Ohio St.3d at 458.[45]

The State's failure to initially disclose Mr. Forest's immunity is not a typical Brady violation because it involved the delayed disclosure of information required by the United States Constitution rather than the complete non-disclosure of such information. In general, Brady does not apply to delayed disclosures, but only to complete failures to disclose. U.S. v. Benes, 28 F.3d 555, 560-61 (6th Cir. 1994). Delayed disclosures only violate Brady if the delay itself causes prejudice. U.S. v. Davis, 306 F.3d 398, 421 (6th Cir. 2002). While there is no dispute that Brady's disclosure requirements encompass grants of immunity to witnesses for the prosecution, see Giglio v. U.S., 405 U.S. 150, 153-54 (1976), the essential issue here is whether Mr. Joseph was prejudiced by this delayed disclosure. Mr. Joseph contends that he was prejudiced as he was deprived of presenting a "coordinated defense around this issue from the outset of the trial at such critical junctures as voire dire [sic], opening statements, and in cross-examining law enforcement officers." (Docket #83, at 43). While the State's failure to disclose Mr. Forest's immunity until after it came out during Mr. Forest's cross-examination may still be relevant in the

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[45] Mr. Joseph contends that, because it assessed the alleged violation in the context of a state procedural rule and concluded that the delayed disclosure was not wilful, the Ohio Supreme Court applied "a rule contrary to the clearly established law of the United States." (Docket #89, at 45). While Mr. Joseph is correct that willfulness is not a factor in assessing Brady violations, see Strickler, 527 U.S. at 281-82, he errs in suggesting that the Ohio Supreme Court misapplied clearly established federal law. First of all, it should be noted that Mr. Joseph framed the issue before the Ohio Supreme Court as "the proper remedy for the State's willful failure to disclose that its chief witness has been granted immunity is a mistrial or the striking of the witness['s] testimony." (Ex. ET). More importantly, as noted above, while it is clear that the Ohio Supreme Court assessed this claim in the context of state law only, its conclusion is nonetheless consistent with clearly established federal law because it also found that Mr. Joseph suffered no prejudice from the delayed disclosure.

context of other exculpatory and/or impeachment evidence allegedly suppressed by the State, this Court finds that the Supreme Court of Ohio did not unreasonably apply clearly established law in concluding that Mr. Joseph was not prejudiced by the late discovery of the immunity. The steps taken by the trial judge in this case - disclosing witness statements and grand jury testimony, permitting Mr. Forest's deposition in the midst of the trial, and allowing defense counsel to further cross-examine Mr. Forest - provided defense counsel with ample opportunity to challenge Mr. Forest's credibility due to the grant of immunity.[46] Though Mr. Joseph's counsel elected not to cross-examine Mr. Forest any further,[47] they did argue, in closing, that Mr. Forest's testimony need to be viewed "very cautiously" as he was "given immunity and released from jail for his testimony." (Tr. 2025).

Accordingly, the Ohio Supreme Court's conclusion that Mr. Joseph did not suffer any prejudice from the delayed disclosure of Mr. Forest's immunity did not result in a decision that was contrary to, or involve an unreasonable application of, clearly established federal law.

Other Purportedly Exculpatory and Impeaching Evidence

In addition to the State's failure to timely disclose Mr. Forest's immunity, Mr. Joseph also argues that the State suppressed other evidence in violation of his constitutional rights. Mr. Joseph contends that the State committed a Brady violation by not disclosing to the defense evidence which tended to inculpate Mr. Forest and evidence which otherwise

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[46] Though Mr. Novak strenuously denied any knowledge of Mr. Forest's immunity, there is some evidence in the record to suggest that, prior to trial, he had learned something about Mr. Forest's immunity from Mr. Forest's attorney. (Tr. 1820-22 and 1824 and 1878-79 and 1881-82; PSG at 59).

[47] Defense counsel made a strategic decision not to recall Mr. Forest, explaining that they did not want to spotlight or emphasize his testimony. (Tr. 1871).

impeached his credibility. With respect to evidence which allegedly inculpates Mr. Forest, Mr. Joseph identifies the following:

- A tip by Tony Newland which indicated that Mr. Forest had been seen cleaning "too thoroughly" a car "matching the description."
- A 10 September 1990 statement by Thad Staley that, at approximately 1 :50 a.m. on 27 June 1990, he observed a white Cutlass on Thayer Road which looked "a lot" like Mr. Forest's and was being driven by an individual that "kind of looked like BILL," but he was not absolutely certain.[48]

(Docket #83, at 28-33).

While Mr. Joseph certainly relies on the Newland tip and the Staley statement to support his Brady claim, the crux of Mr. Forest's argument is that the State delayed disclosure of Mr. Forest's immunity and then failed to disclose, in contravention of the Constitution and direct court order, other evidence which tended to impeach Mr. Forest's credibility by demonstrating that his version of the events changed and was greatly enhanced only after he was given immunity. In particular, Mr. Joseph's claim centers on statements Mr. Forest made to the police prior to the 42-page statement he made on 7 July 1990. In analyzing the merits of his claim, the Court begins by discussing the evidence which Mr. Joseph contends should have been disclosed to him and then turns to the three requisite elements for a successful Brady claim:

Allen County Sheriff Officers had several discussions with Mr. Forest prior to his arrest on 4 July 1990, though the precise number of conversations and their sequence are not

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[48] This statement was provided to the prosecutor. (PSE at 84).

entirely clear from the record. On 28 June 1990, Sergeant Cheney interviewed Mr. Forest at Frank's Car Wash and typed up a Supplemental Offense Report ("28 June Report"). (PSI; PSD at 11-12). According to the 28 June Report, Mr. Forest stated that Bulerin and Joseph used his car on the evening the murder was committed, that Bulerin and Joseph left the O'Connor residence at approximately 10:40 p.m., and that Mr. Forest did not see his car again until Bulerin came to pick him up for work the next morning at around 7:30 or 7:45 a.m.[49] (PSI). Two to three days after Mr. Young's disappearance, Van Horn and Cheney went to the car wash and spoke with Mr. Forest because they felt strongly that his car was involved in the crime. (PSA at 88, PSI). It was a short conversation, during which Sergeant Cheney took notes, with Mr. Forest stating that he had "absolutely no information" that could assist them with their investigation into Mr. Young's disappearance.[50] (PSA at 89; PSD at 13-15 and 18). At some point prior to 4 July 1990, Detective Ketchum also spoke briefly with Mr. Forest at Frank's Car Wash about his white Oldsmobile and the identity of Skosh.[51] (PSC at 22- 23, 25-26, and 38-40). On 4 July 1990, Mr. Forest was arrested and Sergeant Ketchum took a 12

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[49] Although Inspector Van Horn stated that Mr. Forest denied having any knowledge of the crime during the 28 June interview, nothing to that effect is record in the 28 June Report. (PSA at 89; PSI).

[50] It appears from the record that Sergeant Cheney interviewed Mr. Forest twice at the car wash, once by himself and once with Inspector Van Horn. (PSD at 10-12). It is unclear which interview took place first. (PSD at 13).

[51] While the record is not entirely clear, it appears that Detective Ketchum may have actually spoken with Mr. Forest on two separate occasions prior to 4 July 1990. Although Detective Ketchum stated that he would generally have taken some notes and typed up a report of this encounter, there is no written record of this conversation. (PSC at 22).

page statement from him ("4 July Statement").[52] (PSA at 40; PSM). At that time, Mr. Forest was advised that he had been arrested for the murder of Ryan Young. (Tr. 1837-38). On 6 July 1990, Mr. Forest received immunity from prosecution related to Mr. Young's kidnapping and murder. (PSA at 54). On 7 July 1990, accompanied by his attorneys Larry Minnard and Paul Rizor, Mr. Forest gave a detailed 42-page statement to Inspectors Van Horn and Dailey. (PSA at 53-54; PSD at 35-36; PSE at 31 and 38-40).[53]

Despite Mr. Joseph's arguments to the contrary, it is apparent from the record that the 4 July Statement was disclosed to Mr. Joseph's trial counsel. (Tr. 1754). The State does not contest, however, Mr. Joseph's assertion that it did not disclose the 28 June Report, the Newland tip, or the Staley statement. Accordingly, this Court next considers whether any of that evidence was favorable to Mr. Joseph.

Unlike the 4 July Statement which does contain impeachment material,[54] the 28 June Report does not record

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[52] While this statement was taped, only a transcript of the statement remains. (PSA at 63; PSM; PSD at 6-7 and 25).

[53] Mr. Forest also refers to a 6 July 1990 meeting involving himself, his attorney - Larry Minnard, Inspector Van Horn, and Inspector Dailey. (PSA at 31 and PSD at 32). While Mr. Forest described, during his trial deposition, this meeting as a "dry run" of the recorded statement he made the following day (Tr. 1845), Van Horn characterized it quite differently as inconsequential and lasting no more than five or ten minutes, explaining that they had intended to take his statement that day, but decided to delay it because of pertinent information they had received. (PSD at 32-35). As no substantive notes, statements, or recordings exist from this meeting (PSD at 33-34) and it bears no consequence on the Court's decision with respect to this claim, the Court does not address it any further.

[54] In addition to vague statements and denials and failure to mention numerous details, Mr. Forest's 4 July statement contained one particularly noteworthy inconsistency with his trial testimony. On 4 July 1990, he stated that on 27 June 1990 - the morning after the murder - Mr. Bulerin left work at around 9:00 a.m. to buy tires for a client's car. (PSM

any statements by Mr. Forest which tend to impeach his credibility or exculpate Mr. Joseph. In fact, this report, though not very detailed, is consistent with his ultimate testimony. Accordingly, the 28 June Report is not Brady material. As to the Newland tip and the Staley statement, the Court finds that only the Staley statement offers any significant evidence implicating Mr. Forest in the crime or the cover-up and thus only it is evidence favorable to Mr. Joseph. The State argues that such evidence, including the Staley statement, "implicating Forest in the actual murder or a subsequent cover-up cannot be deemed exculpatory to Joseph." (Docket #85, at 66). While it may be true that Mr. Forest's possible role in the offense does not necessarily serve to exculpate Mr. Joseph, the State ignores the possibility that such evidence would tend to impeach Mr. Forest's credibility by giving him a reason to be less than forthright. Because the Staley statement was relevant to Mr. Forest's credibility as a witness, it is Brady material which should have been disclosed.

Although the State should have disclosed the Staley statement, its failure to do so was not prejudicial as contemplated by Brady. Given the vague and uncertain nature of Mr. Staley's statement and Mr. Forest's alibi for that evening, there is no reasonable probability that the outcome of the proceedings would have been different had the State produced this information.

As Mr. Joseph has not met all three Brady requirements with respect to any of the purportedly undisclosed and favorable evidence, his fourth ground for relief fails.

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at 1-2). At trial, Mr. Forest testified that Mr. Bulerin left that morning, at his own initiative, to change the tires on Mr. Forest's car, even though his car had four brand new tires. (Tr. 1624-25).

b. Prosecutorial Misconduct

In his fifth claim for relief, Mr. Joseph cites a litany of purportedly inappropriate, unethical, and/or wrongful acts by the prosecutors which amounted to prosecutorial misconduct rendering his trial fundamentally unfair in contravention of the federal constitution. On direct appeal, the Ohio Court of Appeals thoroughly reviewed Mr. Joseph's allegations of prosecutorial misconduct during voir dire, the guilt/innocence phase, and the penalty phase and rejected them as lacking in merit. (Ex. EP at 36-42).

On habeas review, claims of prosecutorial misconduct are reviewed deferentially. Bowling v. Parker, 344 F.3d 487,512 (6th Cir. 2003) (citing Darden v. Wainwright, 477 U.S. 168,181 (1986)). To succeed on a claim for prosecutorial misconduct, it is not enough for the petitioner to show that the prosecutor's conduct was improper or universally condemned; rather, he or she must demonstrate that the misconduct "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden, 477 U.S. at 181 (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); Mason v. Mitchell, 320 F.3d 604, 634-35 (6th Cir. 2003). Once a court identifies a statement as improper, it considers four factors to determine whether the impropriety was flagrant 1) the likelihood that the remarks would mislead the jury or prejudice the accused, 2) whether the remarks were isolated or extensive, 3) whether the remarks were deliberately or accidentally presented to the jury; and 4) whether other evidence against the defendant was substantial. Bowling, 344 at 512 (citing Boyle v. Million, 201 F.3d 447, 453-54 (6th Cir. 2000); Mason, 320 F.3d at 635. Prosecutorial misconduct claims are reviewed for harmless error. Mason, 320 F.3d at 635.

i. Voir Dire

Mr. Joseph contends that the prosecutor "engaged in [a] pattern of repeated improper comment" during the voir dire, which consisted of:

- Telling the jurors that there would be two phases without qualifying his comments about the second phase.[55]
- Explaining the State's burden of proof is "beyond a reasonable doubt" and that burden is the same in capital and non-capital cases.[56]

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[55] In some cases, the prosecutor merely stated that the case involved two phases:

> Now, you understand that we have a two phase trial? We have the first phase which the guilt or innocent [sic] - you determine the guilt or innocence. The second phase you determine the appropriate sentence or punishment.

(Tr. 237). In others, he explained that there could be two phases to the trial:

> Do you understand this is a two trial- or, there are two phases to this case. The first phase is the guilt or innocent [sic] phase where you and your fellow jurors would determine the guilt or the innocence of this defendant. If you find him guilty of aggravated murder with a death penalty specification ... then we would go to the second phase which is known as the mitigation phase.

(Tr. 412).

[56] Representative of this type of statement is the following:

> The State of Ohio in this case has to prove its case. Our burden is beyond a reasonable doubt. That's the burden of proof we have to sustain. Because we're talking about potentially a capital case would you hold the State of Ohio to any higher degree of proof than you would in any other type of criminal case?
>
> * * *

- Telling some jurors that the verdict in the penalty phase was a recommendation despite the trial court's previous ruling precluding it from making such statements. (Tr. 384).

On direct appeal, the Ohio Court of Appeals concluded that the prosecutor's comments during voir dire "regarding a bifurcated trial, reasonable doubt, the jury's verdict in the sentencing stage as a 'recommendation' or the comments about credibility" were not erroneous and did not deny Mr. Joseph a fair trial by an impartial jury. (Ex. EP at 37-38). Moreover, the Court of Appeals explained that, even if the reference to a recommendation was in error, such error was not prejudicial given the trial court's instructions to the jury during the penalty phase which "served to impress upon the jury the importance of their decision." (Ex. EP at 85-87).

An examination of the prosecutor's comments regarding reasonable doubt and the bifurcation of the trial demonstrates no impropriety. His comments about the verdict during the penalty phase being a recommendation also do not raise a constitutional problem but deserve further discussion. During individual voir dire of two of the jurors who ultimately sat in this case, the prosecutor referred to jury's verdict during the penalty phase as a recommendation.[57] (Tr. 292, 384). Mr.

> I guess if this is where somebody came in here and forged a check for two hundred dollars, well, probably none of us would be quite as serious about it or take it quite as seriously as we do a capital case.
>
> ***
>
> But, on the other hand, the amount of evidence we need is the same in that case as it is in this case.

(Tr. 576).

[57] During individual voir dire of Mr. Hogan, County Prosecutor Bowers stated:

> Could you do that? I mean, you're not going to stand up, but, in effect, that's what you're doing if you come back at the sentencing phase or

Joseph contends that such comments were constitutionally impermissible.

In Caldwell v. Mississippi, the United States Supreme Court established that

> [I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere.

472 U.S. 320, 328-29 (1985). In Caldwell, the defendant's conviction was reversed because the prosecutor had explicitly argued that the responsibility for the imposition of the death penalty was not with the jurors, by telling them that "your decision is not the final decision. Id. The Supreme Court refined this principle in Dugger v. Adams, explaining that "to establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." 489 U.S. 401,407 (1989). Because Ohio's statutes utilize the word "recommend" in describing the jury's function in imposing the death penalty, the prosecutor did not misstate local law. O.R.C. § 2929.03(0)(2) and (3); cf. Bowling, 344 F.3d at 515 (reaching the same conclusion in the context of Kentucky's death penalty statute).

> mitigation phase and you come back with the recommendation to the Court that the death penalty be imposed ....

(Tr. 292). With Ms. Valenti, County Prosecutor Bowers said:

> The Court will tell the jury in the mitigating phase that you have basically three choices, or three recommendations, on the penalty. One choice is the death penalty.

(Tr. 384). During voir dire of the other jurors, County Prosecutor Bowers did not describe the jury's verdict as a recommendation.

Accordingly, the prosecutor's did not commit a Caldwell violation.[58]

ii. Guilt/Innocence Phase

During the guilt/innocence phase of the trial, Mr. Joseph contends the prosecutor committed several prejudicial errors. The Court examines each in turn:[59]

Arguing Facts and Inferences Not Supported by the Record During Closing Arguments

Mr. Joseph argues that Assistant County Prosecutor Berry and County Prosecutor Bowers made several statements during their closing arguments that lacked evidentiary support in the record. On appeal, the Ohio Court of Appeals concluded that there was sufficient evidence in the record to support the statements made by the prosecutors. (Ex. EP at 38-39). As explained in Byrd v. Collins, "[i]t is improper for a prosecutor, during closing arguments, to bring to the attention of the jury any 'purported facts that are not in evidence and are prejudicial.'" 209 F.3d 486, 535 (6th Cir.

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[58] While the prosecutor's reference to the jury's "recommending" a death sentence may have violated the trial court's order, such a statement was not a violation of state law. See e.g. State v. Smith, 38 Ohio St.3d 252, 259 (1988) (reaffirming its "prior refusal to extend Caldwell so as to forbid telling juries that they can only recommend the death sentence and not impose it.")

[59] In addition to the purported misconduct addressed below, Mr. Joseph also contends that the prosecution improperly used leading questions during the direct examination of Mr. Forest and, with respect to testimony regarding the dumping of trash on 28 June 1990, improperly introduced one-sided evidence to create unfair inferences. (Docket #83, at 47-48). As to the leading questions, this Court agrees with the Court of Appeals that Mr. Joseph suffered no prejudice. (Ex. EP at 38). With respect to the evidence regarding the dumping of trash on 28 June 1990, there is no allegation that the State elicited false testimony only that they did not elicit testimony favorable to Mr. Joseph. That job rests with defense counsel not the State. Accordingly, both of these arguments lack merit.

2000). However, prosecutors "must be given leeway to argue reasonable inferences from the evidence." Id. Notwithstanding Mr. Joseph's arguments to the contrary, the Ohio Court of Appeals' conclusion was not an unreasonable application of clearly established federal law, that the prosecutors' arguments regarding the reasons for Ms. Wireman's break-up with Mr. Joseph, Mr. Young's telephone conversation with his mother the night of the murder, the reason for the cuts on Mr. Young's neck, and the number of holes in a particular mask, found sufficient supporting evidence in the record.

Impermissible Witness Vouching During Closing Arguments

Mr. Joseph contends that the prosecutor improperly gave his opinion about the credibility of William Forest, by stating:

> I submit to you that the facts and the evidence and the testimony that Bill Forest has given in this case jives and measures up with all of the other evidence. It matches and meshes with the testimony of all of the other witnesses who had similar contact ....
>
> You sort out all of the evidence and you see from his testimony, well, there's no evidence from that witness stand that in any way implicates Bill Forest. His story checks out a hundred percent. Besides, ladies and gentlemen, he got immunity. He couldn't be prosecuted for something. If you did it, wouldn't you tell? Would you put it off on somebody else? No way. He came in here and told the truth. How did Bill Forest impress you folks? What's his credibility?

(Tr. 2045-46). Mr. Joseph also contends that the prosecutor improperly prefaced numerous comments with "I believe" and "I think." (Tr. 1980, 1984,2005-2008, and 2012). With respect to these arguments, the Ohio Court of Appeals, on direct appeal, concluded that the prosecutor's comments

about credibility were "within permissible limits" and that, while it is improper for the prosecutor to state his personal opinion about what the evidence showed, such comments were not prejudicial to the fairness of Mr. Joseph's trial because:

> There is nothing in the transcript to indicate that Mr. Berry was unfairly attempting to sway the jury to his beliefs. Rather, he was merely urging the jury to draw specific conclusions with respect to the evidence which had been presented at trial. In this context, Mr. Berry's use of "I believe" was not constitutionally infirm.

(Ex. EP at 39-40).

While it is improper for a prosecutor to support the credibility of a witness by indicating a personal belief in the witness's credibility, U.S. v. Young, 470 U.S. 1,9-10 and 18 (1985); U.S. v. Fullerton, 187 F.3d 587, 592 (6th Cir. 1999), a prosecutor may highlight evidence at trial which supports the credibility of a witness. In this case, the prosecutor did not transgress the boundaries between appropriate comments on credibility and improper witness vouching. Read in context, the prosecutor's statement that Mr. Forest's story "checks out a hundred percent" is simply an argument that Mr. Forest's testimony is consistent with and corroborated by the other testimony and evidence presented in the case. Accordingly, the Ohio Court of Appeals did not unreasonably apply clearly established federal law prohibiting witness vouching.

The impropriety of a prosecutor advancing his or her personal beliefs during a closing argument is not limited to vouching for the credibility of witnesses. U.S. v. Carroll, 26 F.3d 1380, 1385 (6th Cir. 1994). In this case, Assistant County Prosecutor Berry improperly couched several of his arguments about the evidence in terms of what he believed or

thought.[60] The trial judge repeatedly sustained objections to the prosecutor's prefacing of statements in terms of what he believed and admonished him of that practice (Tr. 1980, 2005-2008, and 2012).[61] The Court will consider the impact, if any, of the prosecutor's improper statements on the fairness of Mr. Joseph's trial in the conclusion of this section.

Impermissible Comments on Defendant's Silence

In this argument, Mr. Joseph contends that the prosecutor improperly referred to his failure to take the stand on two

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[60] The statements Mr. Joseph complains of are as follows:

> But, I believe that motive is very important.
>
> I believe when you read these exhibits ...
>
> The evidence, I believe, shows you very clearly that he has a history of martial arts.
>
> The evidence, I believe, shows you that somebody opened that passenger door.
>
> I think what you're going to find is they loaded up the car ... and I think you're going to find that they went they saw. . .
>
> Not deep cuts. Taunting cuts. I believe you're going to find –
>
> They went by [Cara Wireman's house] three, four, or five times; ten times. I believe that they –
>
> I believe they took [Mr. Young] to some area and –
>
> I think you're going to find there's no doubt that those two were together and –
>
> But, I believe further –

(Tr. 1980, 1984, 2005-2008, and 2012.)

[61] At one point, the trial judge specifically instructed the jury "to disregard any statement of the prosecutor as to what he believes" and "to rely upon what the evidence shows." (Tr.2007).

separate occasions.[62] In the prosecution's rebuttal, County Prosecutor Bowers stated:

> Mr. Novak would have you infer that there was no kidnapping. Well, you, ladies and gentlemen of the jury, heard all of the evidence. You heard each and every thing that would go to show kidnapping. Uncontroverted. Uncontroverted from that witness stand.

(Tr. 2040). Shortly thereafter, Bowers posed the following rhetorical question: "What evidence do we have, ladies and gentleman, that this defendant didn't do it?" (Tr. 2046). The trial judge sustained defense counsel's objection to that statement and instructed the jury to disregard it. (Tr. 2046-47). On direct appeal, the Court of Appeals concluded that the prosecutor's comments were directed at bolstering its version of the events rather than to reflect on defendant's decision not to testify and that the "jury would not 'naturally and necessarily' have considered these remarks to be comments on [Mr. Joseph's] failure to testify." (Ex. EP at 41).

Federal law is clearly established that direct references to a defendant's decision not to testify at trial are constitutionally impermissible. Griffin v. California, 380 U.S. 609, 615 (1965). Although prosecutors can "summarize the evidence and comment on its quantitative and qualitative significance," Bowling, 344 F.3d at 514 (quoting U.S. v. Bond, 22 F.3d 662, 669 (6th Cir. 1994)), indirect references to a defendant's failure to testify can also violate the defendant's Fifth Amendment privilege, Byrd v. Collins, 209 F.3d 486, 533 (6th Cir. 2000). Courts use four factors to evaluate statements which purportedly constitute indirect comments on the defendant's decision not to testify: "1)

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[62] In addition to the prosecutor's alleged comments on his decision not to take the stand, Mr. Joseph also alleges that the following comments about the evidence were improper.

Were the comments 'manifestly intended' to reflect on the accused's silence or of such a character that the jury would 'naturally and necessarily' take them as such; 2) were the remarks isolated or extensive; 3) was the evidence of guilt otherwise overwhelming; 4) what curative instructions were given and when." Bowling, 344 F.3d at 514 (quoting Lent v. Wells, 861 F.2d 972, 975 (6th Cir. 1988)). Manifest intent can not be found if there is some other equally plausible explanation for the prosecutor's statement. Byrd, 209 F. 3d at 534. In addition, "the question is not whether the jury possibly or even probably would view the statements as comments on the defendant's failure to testify, 'but whether the jury necessarily would have done so.'" Id.

In this case, the Ohio Court of Appeals did not unreasonably apply federal law when it concluded that prosecutor's statements were not of such a character that a jury would "naturally and necessarily" understand them as reflections on Mr. Joseph's silence. General statements that certain evidence is "uncontradicted" or "uncontroverted" do not constitute indirect comments on defendant's silence when "witnesses other than the defendant could have contradicted the evidence." Byrd, 209 F.3d at 534 (quoting Raper v. Mintzes, 706 F.2d 161, 164 (6th Cir. 1983)). Because witnesses other than the defendant could have offered contradictory evidence regarding the kidnapping, the prosecutor's reference to the evidence of the kidnapping as "uncontroverted" does not necessarily refer to Mr. Joseph's decision not to testify. Moreover, the Ohio Court of Appeals did not unreasonably extend this general rule in finding that prosecutor's further statement "uncontroverted from this witness stand" fell within constitutional bounds.

The prosecutor's second statement also does not necessarily refer to defendant's decision not to take the stand because evidence that Mr. Joseph did not commit the crimes charged could be garnered from the government's case and could have been presented by the defense through other

witnesses. While Mr. Joseph framed his analysis of this statement in terms of commenting on his silence, the problematic nature of County Prosecutor Bowers' statement about the absence of evidence relating to Mr. Joseph's innocence is actually based on its potential implication that the defendant bears a burden to prove his innocence. It is improper for the prosecutor to suggest that the defendant has "the burden of proof or any obligation to produce evidence to prove his innocence." U.S. v. Clark, 982 F.2d 965, 968-69 (6th Cir. 1993). Here, the prosecutor's rhetorical assertion regarding the absence of evidence of Mr. Joseph's innocence impermissibly shifts the burden of proof. By referring to the existence, or lack thereof, of evidence supporting Mr. Joseph's innocence rather than his guilt, this type of argument is improper because it bears the potential to undermine the presumption of innocence, a central tenet of our criminal justice system. The impact of the prosecutor's statement on the fairness of Mr. Joseph's trial is weighed below.

iii. Penalty Phase

Mr. Joseph also raises allegations of prosecutorial misconduct during the penalty phase due to the prosecution's purported misstatement of the parties' respective burdens in the penalty phase, misleading questions which purportedly reinforced the faulty indictment and emphasized the misconception that only evidence related to the culpability could be considered, and its comments, during closing arguments, related to Mr. Joseph's demeanor and "lack of remorse." On direct appeal, the Court of Appeals rejected Mr. Joseph's contentions concluding that the misstatement of the law and the comments about the effect of mitigating evidence did not prejudice Mr. Joseph or taint the fairness of his trial and that the comments about Mr. Joseph's demeanor "throughout the course of the trial did not unfairly tip the scales of justice in favor of the State." (Ex. EP at 42).

Misstatement of the Law

County Prosecutor Bowers began his opening statement during the penalty phase with the following:

> May it please the Court, gentlemen for the defense and ladies and gentlemen of the jury. Very briefly, at this phase of the proceeding the State of Ohio has no obligation to present any evidence or go forward. The burden is on the defense. It is our contention that once you have heard all of the -

(Mitigation Tr. 32). At this point, the trial judge sustained defense counsel's objection and explained that the "burden of going forward is on the defense only." (Mitigation T 32). While the prosecutor's statement suffered from a lack of clarity, it was not a material misstatement of the law because a fair reading demonstrates that he was addressing only the burden of going forward with mitigation evidence which is in fact (on the defense. Under Ohio law, the parties' respective burdens are allocated as follows

> The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

O.R.C. § 2929.03(D)(1).

Despite the potential ambiguity which occurred during this interchange between the prosecutor and the trial court, the trial judge properly instructed the jury about the burden of proof in the penalty phase in both his initial instructions to the jury and in his jury charge. (Mitigation Tr. 28-29 and

322).[63] Accordingly, the prosecution's potentially ambiguous statement about defendant's burden was not improper and, even it was, certainly caused no prejudice to the defendant.

Comments on the Effect of Mitigating Evidence

In cross-examining two of Mr. Joseph's witnesses during the penalty phase, the prosecution sought to undercut their testimony by asking about the connection between their testimony and the kidnapping. After Ms. Vore, Richard Joseph's mother, testified about a venereal disease she contracted while pregnant with Mr. Joseph, his medical

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[63] The trial court's initial instructions explained:

> At the mitigation phase the defendant will have the opportunity to offer evidence of mitigating factors to attempt to offset the affect of the aggravating circumstance as set forth and as found by you during the guilt determination phase. The State will also be allowed to present rebuttal evidence at this hearing.
>
> * * *
>
> You will then deliberate and weigh the aggravating circumstance, of which the defendant has been found guilty, against any mitigating factors. Again, you must determine whether the State of Ohio has proven beyond a reasonable doubt that the aggravating circumstance of which the defendant is guilty outweighs the mitigating factors.

(Mitigation Tr. 27-29). In its charge to the jury, the trial court similarly stated:

> The State of Ohio seeks a finding that the sentence of death be imposed on the defendant. Before you can make such a finding the State has the burden of proving by proof beyond a reasonable doubt that the aggravating circumstance set forth in the specification ... outweighs the factors in mitigation. The State of Ohio is limited by statute in its presentation of evidence to the aggravating circumstance of which the defendant has been found guilty of committing. The defendant has no burden of proof and no such limitation.

(Mitigation Tr. 322). These instructions were further reinforced by the verdict form which restated the "beyond a reasonable doubt" burden. (Mitigation Tr. 330-31).

problems as an infant, and his witnessing his father physically abuse her (Mitigation Tr. 36-39), Assistant County Prosecutor Berry asked Ms. Vore what, in her opinion, those things had to do with kidnapping, (Mitigation Tr. 66-67). Similarly, after defense expert Dr. Wayne Graves testified about Mr. Joseph's potential learning disability (Mitigation Tr. 229-30), County Prosecutor Bowers asked "[w]hat does learning disabled have to do with kidnapping?" (Mitigation Tr. 248). Mr. Joseph asserts that this line of questioning was improper because it had the effect of misleading the jury that only mitigation evidence which excused liability was to be considered.

Although Mr. Joseph frames this argument as purely a prosecutorial misconduct claim, it is best analyzed within the context of the Eighth Amendment's capital sentencing requirements. As explained by the United States Supreme Court in Lockett v. Ohio, "the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. 586,604 (1978) (Emphasis in original). In this vein, the Supreme Court's central "concern has been that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence." Buchanan v. Angelone, 522 U.S. 269, 276 (1998). This Eighth Amendment mitigation requirement imposes constitutional limits on the conduct of prosecutors. DePew v. Anderson, 311 F.2d 742, 748 (2002). "When a prosecutor's actions are so egregious that they effectively 'foreclose the jury's consideration of ... mitigating evidence,' the jury is unable to make a fair, individualized determination as required by the Eighth Amendment." Id. (quoting Buchanan, 522 U.S. at 277). Accordingly, "a prosecutor's comments violate the Eighth Amendment when they are so prejudicial as to

'constrain the manner in which the jury was able to give effect' to mitigating evidence." (quoting Buchanan, 522 U.S. at 277).

In advancing four cross-examination questions which could be construed as an improper suggestion that the jury may not consider mitigating evidence unrelated to Mr. Joseph's culpability for the kidnapping, the prosecutors did not commit conduct so egregious as to constrain the manner in which the jury was able to give effect to the mitigating evidence. Assuming that the prosecutor's questions were improper for the reasons asserted by Mr. Joseph, they did not impede the jury's ability to consider all mitigating evidence and make the fair, individualized determination required by the Eighth Amendment. The purportedly improper questions were few in number, were at worst ambiguous, and were not accompanied by any improper closing arguments related to what the jury could consider as mitigating evidence. Even if the jury was initially confused by the prosecutor's cross-examination of Ms. Vore and Dr. Graves, any confusion was erased by the judge's clear-cut instruction defining mitigating evidence and properly explaining its extreme breadth:

> Mitigating factors are factors which, while they do not justify or excuse the crime of aggravated murder, nevertheless may be considered by you as extenuating, lessening, weakening, excusing to some extent, or reducing the degree of the defendant's blame.
>
> These mitigating factors which you are to weigh include, but are not limited to, the nature and circumstances of the offense, the history, character and background of the offender, and any or all of the following statutory factors.
>
> One, whether it is unlikely that the offense would have been committed, but for the fact that the

> defendant was under duress, coercion, or strong provocation;
>
> Two, the youth of the defendant.
>
> Three, the defendant's lack of a significant history of prior criminal convictions and delinquency adjudications, and
>
> Four, any other factors that are relevant to the issue of whether the defendant should be sentenced to death.

(Mitigation Tr. 326-27). Accordingly, the prosecutor's cross-examination questions did not run afoul the Eighth Amendment.

Comments about Mr. Joseph's Demeanor

Mr. Joseph argues that the prosecution made improper closing arguments during the penalty phase in referring to his demeanor. Assistant County Prosecutor Berry first stated the following:

> You have had a chance over the course of this trial to observe the demeanor of the defendant and his remorse. You heard yesterday through comments of the psychologist that he can't admit this. He has never come to grips with what happened, and maybe never will.

(Mitigation Tr. 283). In defendant's closing argument, Mr. Weller urged the jury to consider Mr. Joseph's "statement of his feelings of remorse yesterday when he told you that he was sorry for what happened and sorry for the pain that it has caused" and "[h]is visible showing of emotion at that point and time was certainly contrary to his nature." (Mitigation Tr. 309). In his final closing argument, County Prosecutor Bowers responded:

> You know, the evidence includes the defendant's demeanor, or lack of remorse, demonstrated during trial. Mr. Weller talks about showing emotion and

> smiling at people. You saw his demeanor. You saw whether he had remorse, or lack of remorse, throughout the course of this trial. What does that mean? You, ladies and gentlemen, are the judges.

(Mitigation Tr. 318). Mr. Joseph contends that the prosecution's statements about demeanor being evidence was an improper statement of the law and that comments about lack of remorse amounted to a comment on his failure to testify.

Contrary to Mr. Joseph's assertion, his trial demeanor is evidence the judge and jury can consider during sentencing. U.S. v. Grayson, 438 U.S. 41, 49 (1978) (citing Chaffin v. Stynchcombe, 412 U.S. 17, 32 (1973)). Moreover, isolated comments about defendant's remorse, or lack thereof, such as the prosecution made in this case do not reflect a manifest intent to comment on defendant's decision not to testify nor would the jury necessarily understand them as such. Wickline v. Mitchell, 319 F.3d 813, 823-24 (6th Cir. 2003).[64] Accordingly, Mr. Joseph's arguments about the impropriety of the prosecutor's statements are unavailing.

iv. Conclusion Regarding Prosecutorial Misconduct

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[64] While the question of whether comments about lack of remorse violate a defendant's Fifth Amendment right not to testify turn on the specific comments made and the circumstances of each case, most circuit courts, under varying circumstances, have found no constitutional error. See, e.g., Torres v. Mullin, 317 F.3d 1145, 1159 (10th Cir. 2003) (no constitutional error); Issacs v. Head, 300 F.3d 1232, 1271-72 (11th Cir. 2002) (no constitutional error); Hough v. Anderson, 272 F.3d 878, 901-902 (7th Cir. 2001); Six v. Delo, 94 F.3d 469,477 (8th Cir. 1996) (no constitutional error); Gaskins v. McKellar, 916 F.2d 941, 951 (4th Cir. 1990) (no constitutional error); but see Lesko v. Lehman, 925 F.2d 1527, 1544-45 (3rd Cir. 1991) (constitutional error) and Beardless v. Woodford, 358 F.3d 560, 587-88 (9th Cir. 2004) (constitutional error, but a harmless one).

Having thoroughly reviewed Mr. Joseph's numerous allegations of prosecutorial misconduct, the Court has found only two instances of impropriety, both related to the prosecutor's closing argument during the guilt/innocence phase. During his closing, the prosecutor improperly couched several of his arguments about the evidence in terms of what he believed or thought and made an improper reference to the absence of evidence demonstrating Mr. Joseph's innocence. However, these improprieties did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. As the judge immediately admonished the prosecutor for his transgressions, explained to the jury that it should disregard statements about what the prosecutor believed, and clearly instructed the jury on burden of proof, it is unlikely the improper statements prejudiced the accused. Moreover, the prosecutor's improper comment about burden of proof was of an isolated nature and his continual prefacing of statements with "I believe" and "I think" appear to be inadvertent and unintentional.

Given the preceding analysis coupled with courts' deferential consideration of prosecutorial misconduct claims on habeas review and their particular reluctance to "grant habeas petitions based on improper prosecutorial statements at closing argument," Wilson v. Mitchell, 250 F.3d 388, 399 (6th Cir. 2001), the state court's rejection of Mr. Joseph's prosecutorial misconduct claim was not contrary to, nor did it involve an unreasonable application of, clearly established federal law.

6. Sufficiency of Evidence: Third and Tenth Grounds for Relief

In Mr. Joseph's third and tenth grounds for relief, he contends that his conviction was not based upon evidence sufficient to prove his guilty beyond a reasonable doubt and therefore violated his due process rights. In ground three, he argues that there was insufficient evidence to prove that Mr.

Joseph was the actual killer. (Docket #83, at 23). In his tenth ground for relief, Mr. Joseph asserts that there was also insufficient evidence that Mr. Joseph kidnapped Mr. Young, a finding necessary to convict him of aggravated murder and the death penalty specification. (Docket #83, at 92-93).

The Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). Evidence is sufficient to support a conviction if "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979); McKenzie v. Smith, 326 F.3d 721,727 (6th Cir. 2003). This same standard applies regardless of whether the evidence of guilt was direct or circumstantial. Scott v. Elo, 302 F.3d 598, 602 (6th Cir. 2002). In conducting their analysis, courts should refrain from assessing the credibility of witnesses, which is the province of the jury. Schlup v. Delo, 513 U.S. 298, 330 (1995); McKenzie, 326 F.3d at 727. If the judgment is not supported by "substantial and competent evidence" upon the record as a whole, the judgment must be reversed. McKenzie, 326 F.3d at 727.

a. Insufficient Evidence that Mr. Joseph was the Actual Killer

In his third ground for relief, Mr. Joseph argues that there was insufficient evidence to prove that he was "the principal offender in the commission of the aggravated murder" as required by R.C. 2929.04(A)(7). Under Ohio law, the "principal offender" means the "actual killer." Byrd v. Collins, 209 F.3d 486, 496 n.2 (6th Cir. 2000) (citing State v. Penix, 32 Ohio St.3d 369, 371 (1987)). Accordingly, Mr. Joseph asserts that the State failed to prove beyond a

reasonable doubt that he was the "actual killer" of Mr. Young.[65]

On direct appeal, the Ohio Supreme Court held that "sufficient evidence existed for a rational trier of fact to find that [Mr. Joseph] was the principal offender, i.e. actual killer, in the aggravated murder of Ryan Young beyond a reasonable doubt." Joseph, 73 Ohio St. 3d at 459. In reaching this determination, the Ohio Supreme Court specifically pointed to the following evidence in the record:

> The record demonstrates that appellant was jealous of Ryan's relationship with Cara Wireman. In one letter to his ex-girlfriend Cara, appellant admitted that he had been secretly watching Cara and Ryan. Appellant also told Cara that he wanted her to stop seeing Ryan so that they could renew their relationship. Thus, appellant had a motive to kill the victim. On Tuesday, June 26, just prior to Ryan's abduction, the white Cutlass often driven by appellant was seen near Cara's home on Thayer Road as Ryan was about to leave. Appellant later admitted that he and Bulerin were driving around in Forest's white Cutlass on that

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[65] Mr. Joseph also asserts in a footnote in his traverse that the State's evidence was "insufficient to prove the necessary culpability to justify the death penalty under Enmund v. Florida, 458 U.S. 782 (1982); Tison v. Arizona, 481 U.S. 137 (1987). In Enmund, the United States Supreme Court held the Eighth Amendment does not permit imposition of the death penalty on someone "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." 458 U.S. at 797. In Tison, the United States Supreme Court elaborated on Enmund by holding "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement." 481 U.S. at 158. As Enmund and Tison's culpability requirements are easily satisfied if there is sufficient evidence that Mr. Joseph was the actual killer, this Court need not engage in a separate analysis of these cases or their progeny.

> night until about 2:30 a.m. Cara's neighbor, Rose Fetter, observed a white car with two occupants in it drive up and down Thayer Road at about 11 :15 p.m. that night. Cara observed the car which matched the description of Forest's car pass her home ten to twelve times just after Ryan left. The vegetation across from Cara's home was found to be trampled down as if someone had been recently sitting in the area. Ryan's body was found buried on property owned by appellant's grandparents and on land with which appellant was familiar. The body was wrapped in Visqueen which matched Visqueen recovered from the job site at Indian Lake where appellant had been working. Forest stated that appellant had a black mask, and a black ninja mask was found under the body of the victim. Furthermore, Ryan suffered two stab wounds, either of which could have been fatal, and the knife always kept in the car was missing the morning of the disappearance.

Id.

Analyzing this claim under the AEDPA rubric, as one must, it is not the role of this Court to sit in direct review of the Ohio Supreme Court and determine whether it misapplied Jackson's sufficiency of evidence test to the facts of this case. Rather, this Court's review of the Ohio Supreme Court's decision is limited to a determination of whether its conclusion was objectively unreasonable. Within that constrained level of review, this Court does not find objectively unreasonable the Ohio Supreme Court's conclusion, that a rational jury could infer, based on the circumstantial evidence presented, that Mr. Joseph was the actual killer.[66]

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[66] It should be noted that the Ohio Supreme Court split 4-3 on the issue of whether there was sufficient evidence that Mr. Joseph was the actual

In arguing this ground for relief, Mr. Joseph relies almost exclusively on the prosecution's assertions that it did not know and did not need to establish the identity of the actual killer. It is true of course that the State oddly conceded that they could not and indeed need not prove whether Joseph or Bulerin was the actual killer. However, this concession goes to the State's misunderstanding of the crime charged and not necessarily to the existence of evidence supporting Mr. Joseph's conviction. The prosecution's misunderstanding of the crime charged and its failure to make arguments consistent with the elements of that crime does not automatically mean, as suggested by Mr. Joseph, that the record contained insufficient evidence to support a finding of that element. The prosecution's arguments do, however, further suggest the jury was misled to believe that it could find Mr. Joseph guilty of the specification without finding him to be the actual killer, a constitutional problem addressed

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killer. In a dissent joined by two other Justices, Chief Justice Moyer explained:

> [T]his record contained no evidence, either direct or circumstantial, as to who held the knife (or knives) that were thrust into Young causing his death. The state simply did not prove Joseph guilty of a felony-murder death specification beyond a reasonable doubt. It instead conceded that it knew virtually nothing as to the precise circumstances by which Young was murdered, including the facts as to who was his actual killer (or killers).
>
> In short, the record is sufficient to support speculation as to who actually killed Young .... Unfortunately, however, the evidence produced by the state does not confirm either speculation. We simply do not know, on the basis of this record, who killed Young. [Accordingly], I do not find that this record supports a finding that Joseph was proven guilty of being a principal offender, i.e., actual killer, in the felony-murder of Young.

73 Ohio St.3d at 470 (Moyer, C.J. dissenting).

in conjunction with several other of Mr. Joseph's grounds for relief.

b. Insufficient Evidence that Mr. Young was Kidnapped

In his tenth ground for relief, Mr. Joseph contends that there was insufficient evidence to support the State's theory of aggravated murder - that Mr. Young was kidnapped prior to the murder. While he concedes that Mr. Young was undeniably murdered, he asserts that there is insufficient evidence to establish the kidnapping because there was no evidence "when or where the murder occurred" or "that the victim was restrained." (Docket #83, at 93). While Mr. Young's body was discovered in a different place than his car, Mr. Joseph claims that is insufficient to prove kidnapping because Mr. Young could have been murdered immediately and then moved to a separate location.

Relying on facts discussed in the context of Mr. Joseph's other insufficiency of evidence argument along with all the other evidence adduced at trial, the Ohio Supreme Court concluded that there was sufficient evidence to convince a trier of fact that Mr. Joseph was guilty beyond a reasonable doubt of kidnapping Mr. Young. Joseph, 73 Ohio St.3d at 459. After conducting its own review of the record, this Court does not find the Ohio Supreme Court's conclusion objectively unreasonable. While a rational jury could conclude that Mr. Young was murdered before his body was moved, such a jury could also infer from the evidence adduced at trial that Mr. Young was forcibly abducted from his car, moved to another location, and then murdered. Given that this Court must view the evidence in a light most favorable to the prosecution, it concludes that there was sufficient evidence to support a finding that Mr. Young was kidnapped and therefore that Mr. Joseph was guilty of aggravated murder.

7. Improper Sentence: Twelfth, Sixteenth, and Nineteenth Grounds for Relief

a. Improper Imposition of Death Sentence by the Trial Court (Ground Twelve)

In his twelfth ground for relief, Mr. Joseph contends that the trial judge, in imposing the death sentence, failed to properly consider the mitigating factors and considered uncharged aggravating circumstances, thereby violating Mr. Joseph's Fifth, Eighth, and Fourteenth Amendment rights.[67]

In issuing Mr. Joseph's sentence, the trial court stated:

> Wherefore, on the count of aggravated murder with the specification of kidnapping the Court sentences you to be delivered to the Sheriff of this County to the Orient Reception Center ... wherein on June 26, 1991 you'll be put to death by electrocution.

(Mitigation Tr. 365-66). The trial judge followed the imposition of the sentence with a written opinion, as required by Ohio R. C. § 2929.03(F).[68] In that opinion, the trial judge explained that he considered all the statutory mitigating factors set forth in Section 2929.04(B) as well as other allegedly mitigating evidence advanced by Mr. Joseph. (Ex. EL at A-7-10). The Court then stated its conclusion:

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[67] In his traverse, Mr. Joseph makes clear that he is not arguing that his constitutional rights were violated because the trial court failed to give proper weight to different circumstances. (Docket #89, at 87).

[68] Section 2929.03(F) provides in pertinent part:

> The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (8) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.

> Upon consideration of the evidence raised at the original trial, the testimony, other evidence, and the arguments of counsel, the Court finds that the defendant established two factors which are to be considered as mitigating factors under 2929.04(B). Those two factors include the youth of the offender and the offender's lack of a significant history of prior criminal convictions and delinquency adjudications. The Court finds, however, beyond a reasonable doubt that the aggravating circumstance the offender was found guilty of committing outweighs the evidence in mitigation opposed to it.
>
> The particularly heinous kidnapping associated with the Aggravated Murder was a calculated act for which the defendant was responsible. The nature and circumstances of the proven specification provide no indicia of justification and indicate to the Court a brutally planned and ruthless act. The aggravated circumstances were lurid; the mitigating factors were negligible and provide no reduction or lessening of the defendant's blame. For those reasons, the Court finds that the aggravating circumstance outweighs mitigating factors under Revised Code 2929.03.
>
> The Court, therefore, imposed the sentence of death upon the defendant, the Court having found beyond a reasonable doubt that the aggravating circumstance, set forth as a kidnapping specification, outweighs any mitigating factors as presented.

(Ex. EL a tA-10-11).

This Court begins by considering the trial court's handling of the mitigating circumstances and then turns to its purported reliance on uncharged aggravating circumstances.

i. Mitigating Circumstances

Relying on Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982), Mr. Joseph contends that the trial correct "erroneously believed that mitigating factors must excuse criminal liability." (Docket #89, at 88). Though it did not specifically address this precise issue, the Ohio Court of Appeals, on direct review, concluded that the trial court did "consider all the statutory mitigating factors including other factors relevant to the issue of whether Appellant should be sentenced to death." (Ex. EP at 36).

Notwithstanding Mr. Joseph's protestations to the contrary, the trial court did not run afoul the United State Supreme Court's holdings in Lockett and Eddings. In Lockett, the United States Supreme Court held that the Eighth and Fourteenth Amendments require the sentencer in capital punishment cases:

> not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

438 U.S. at 604 (emphasis in original). In applying the Lockett rule, the United States Supreme Court subsequently held that the sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. Eddings, 455 U.S at 112-14.

In this case, the Lockett and Eddings rules were clearly adhered to because the trial court considered all of the circumstances advanced by Mr. Joseph as mitigating. Unlike the court in Eddings, the trial court in this case considered all the evidence offered by Mr. Joseph but simply found that it did not rise to the level of a mitigating factor and/or that the aggravating circumstance outweighed the mitigating factors.

The trial court's statement that "the mitigating factors were negligible and provide no reduction or lessening of the defendant's blame" amounts to a description of the weight the afforded the evidence and not statement that certain factors could not be considered because they did not excuse criminal liability. In "evaluat[ing] the evidence in mitigation and find[ing] it wanting as a matter of fact," see Eddings, 455 U.S. at 113-15, the trial court handled the mitigation evidence consistent with the mandates of Lockett and Eddings. Accordingly, no constitutional violation occurred here.

ii. Aggravating Circumstance

Mr. Joseph also argues that the trial court's reference to aggravating circumstances in the plural and description of the act as "calculated," "brutally planned," and "ruthless," indicates that trial judge considered an uncharged aggravating circumstance in imposing the sentence. Citing State v. Green, 66 Ohio St. 3d 141, 149 (1993), the Court of Appeals rejected this argument explaining that when, a trial court correctly identifies a statutory aggravating circumstance, "a reviewing court will infer that the trial court understood the difference between statutory aggravating circumstances and facts describing the nature and circumstances of the offense." (Ex. EP at 35).[69] Notwithstanding the trial court's descriptions of the act, the Court of Appeals concluded that the "record leaves no doubt the trial court treated the kidnapping as the only aggravating circumstance." (Ex. EP at 35).

Even if the Ohio Court of Appeals' analysis is incorrect as a matter of state law there is no constitutional violation

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[69] Moreover, a sentencing judge, under R.C. 2929.03(F), "may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors." State v. Stumpf, 32 Ohio St. 3d 95, syllabus,,¶ (1987).

because "once a defendant is found eligible for death based on a constitutionally sufficient narrowing circumstance, the sentencer's discretion is virtually unlimited." Smith v. Mitchell, 348 F.3d 177, 210 (6th Cir. 2003) (citing Zant v. Stephens, 462 U.S. 862, 878-79 (1983)). The constitutional problem in this case did not occur because the judge improperly relied on multiple aggravating circumstances when only one was charged in the indictment. Rather, the fundamental problem, as addressed in various parts of this opinion, is that Mr. Joseph did not have proper notice of the aggravating circumstance for which he was ultimately sentenced to death and that, given the ambiguity associated with the aggravating circumstance, it is far from clear that the jury actually found that Mr. Joseph, while committing a kidnapping, was the principal offender in the commission of the aggravated murder.[70] If this Court erred, elsewhere in its opinion, in determining that Mr. Joseph's constitutional rights were violated, then the trial court's decision to impose the death sentence causes no independent constitutional violation. If this Court properly identified the constitutional violations at issue in this case, then precisely what aggravating circumstance was considered by the trial court judge is immaterial because he lacked the authority to impose the death sentence at all.

Accordingly, Mr. Joseph is not entitled to habeas relief on his twelfth ground for relief.

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[70] The Court notes that the ambiguous treatment of the aggravating circumstance continued throughout the sentencing phase as the trial court referred to the aggravated circumstance as "the specification of kidnapping" and the "kidnapping specification" and the Ohio Court of Appeals likewise referred to it as the "kidnapping." While this may simply be a cursory way to describe the specification, it maintains the ambiguity about whether Mr. Joseph was sentenced to death for being the principal offender in the commission of the kidnapping, as charged in the indictment, or for being the principal offender in the commission of the aggravated murder, as required by statute and as specified on the verdict form.

b. Disproportionate Sentence of Death (Ground Sixteen)

In this ground for relief, Mr. Joseph offers the interrelated arguments that he was denied a meaningful proportionality review and that his sentence was in fact disproportionate to his co-defendant Bulerin and to other criminal defendants in Ohio, in violation of the Eighth and Fourteenth Amendments. Both of these arguments lack merit.

Here, the Ohio courts did conduct a proportionality review, as required by Ohio R.C. § 2929.05 and consistent with the Ohio Supreme Court's decision in State v. Steffen, 31 Ohio St. 3d 111 (1987). Steffen provides that the proportionality review required by Section 2929.05 is satisfied by "a review of those cases already decided by the reviewing court in which the death penalty has been imposed." 31 Ohio St. 3d at syllabus ¶1. Both the Ohio Court of Appeals and the Supreme Court of Ohio performed such a review and concluded that Mr. Joseph's sentence was appropriate, proportionate and not excessive. (Ex. EP at 47-48; Joseph, 73 Ohio St.3d at 463). Mr. Joseph's first argument is that the Steffen decision has "precluded capital defendants from receiving a fair proportionality review." (Docket #83, at 115).

Contrary to Mr. Joseph's assertion, he does not have a federal constitutional right to have appellate courts conduct a review of his death sentence to ensure that it is proportional to that of similarly-situated defendants. In Pulley v. Harris, the United States Supreme Court held that the Eighth Amendment does not require state appellate courts to conduct a comparative proportionality review in capital cases. 465 U.S. 37, 50-51 (1984). Recently, the Sixth Circuit explained, "[s]ince proportionality review is not required by the Constitution, states have great latitude in defining the pool of cases used for comparison" when a state statute provides for such review, as Ohio's death penalty statute does. Buell, 274

F.3d at 369; Wickline, 319 F.3d at 824. Examining the approach of Ohio's courts, the Sixth Circuit has held, "[b]y limiting proportionality review to other cases already decided by a reviewing court in which the death penalty has been imposed, Ohio has properly acted within the wide latitude it is allowed." Buell, 274 F.3d at 369; Wickline, 319 F.3d at 824. Accordingly, the Sixth Circuit has consistently rejected challenges to the constitutionality of the Steffen decision and repeatedly determined that "Ohio's system of proportionality review complies with the dictates of the Due Process Clause." Williams v. Baaley, 380 F.3d 932, 961-62 (6th Cir. 2004); Smith v. Mitchell, 348 F.3d 177, 214 (6th Cir. 2003); Buell, 274 F.3d at 369; Wickline, 319 F.3d at 824. Accordingly, Mr. Joseph's first argument fails. Assuming the constitutionality of Ohio's proportionality review system, Mr. Joseph nonetheless argues that the sentence of death imposed in his case was in fact disproportionate. In making this argument, Mr. Joseph points to his co-defendant Bulerin who received a life sentence and argues that the three felony-murder cases cited by the Ohio Supreme Court are inapposite. Given the constitutionality of Ohio's proportionality review, Mr. Joseph does not clearly delineate the constitutional basis for his claim that the proportionality review was incorrectly conducted in his case. Assuming that such a claim may implicate due process concerns, Mr. Joseph's argument still lacks merit as the Ohio courts followed the strictures of their proportionality review system in Mr. Joseph's case. Ohio's proportionality review does not require that Mr. Joseph's sentence be compared to non-capital murder cases or "cases where the death sentence could have been sought, but was not." Steffen, 31 Ohio St.3d at 122-23. Accordingly, Mr. Bulerin's life sentence does not factor into Ohio's proportionality review calculus. As to other death penalty cases cited by the Ohio courts in concluding that Mr. Joseph's death sentence was proportionate, the factual differences in those cases alluded to by Mr. Joseph are wholly insufficient to support his claim

that a constitutional violation occurred in the course of the Ohio courts' review.

As Mr. Joseph has not established a federal constitutional violation, his sixteenth ground does not entitle him to federal habeas relief.

c. Ohio's Death Penalty System is Unconstitutional (Ground Nineteen)

Mr. Joseph advances several arguments that Ohio's capital punishment scheme is both facially unconstitutional and unconstitutional as applied. On direct review, the Court of Appeals summarily rejected Mr. Joseph's claims. (Ex. EP at 93). Mr. Joseph's facial arguments - that Ohio's death penalty scheme is unconstitutional because of the discretion of prosecutors in indictment decisions, because it lacks meaningful proportionality review, because it fails to meaningfully narrow the class of people eligible for the death penalty, because it imposes an impermissible risk of death on capital defendants who exercise their right to a jury trial, because it lacks meaningful appellate review, and because it permits the arbitrary and discriminatory imposition of the death penalty - have been soundly rejected. Pulley v. Harris, 465 U.S. 37, 50 (1984); Gregg v. Georgia, 428 U.S. 153, 199; Byrd v. Collins, 209 F.3d 486,539 (6th Cir. 2000); Greer v. Mitchell, 264 F.3d 663, 690-691 (6th Cir. 2001); Buell v. Mitchell, 274 F.3d 337,370 (6th Cir. 2001); Wickline v. Mitchell, 319 F.3d 813, 824 (6th Cir. 2003); Smith v. Mitchell, 348 F.3d 177,214 (6th Cir. 2003), Williams v. Bagley, 380 F.3d at 961-66.

In addition to his facial challenges, Mr. Joseph also contends that Ohio's sentencing scheme is unconstitutional as applied to the facts of his case because the State's failure to charge the correct capital specification and the judge's failure to properly instruct the jury on that specification violated the Eighth Amendment's narrowing requirement.

i. Eighth Amendment Narrowing Requirement

In 1981, the Ohio legislature adopted the death penalty specifications at issue in this case "in direct response to a series of cases in the Supreme Court of the United States interpreting the Eighth Amendment." Esparza v. Mitchell, 310 F.3d 414, 417 (6th Cir. 2002), rev'd Mitchell v. Esparza, 540 U.S. 12 (2003). In Furman v. Georgia, a majority of the United States Supreme Court, albeit in five separate concurring opinions, concluded that capital sentencing schemes that provided too much discretion to the jury amounted to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. 408 U.S. 238 (1972). A plurality of the Court encapsulated the Furman consensus as follows:

> where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). To avoid the constitutional flaw of the imposition of the death penalty in an arbitrary and capricious manner, "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)). Statutory aggravating circumstances, like those used in Ohio, "playa constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty." Zant, 462 U.S. at 878; Pulley v. Harris,

465 U.S. 37, 53 (1984); see also Byrd v. Collins, 209 F.3d 486, 539 (6th Cir. 2000); Scott v. Mitchell, 209 F.3d 854, 885 (6th Cir. 2000). In addition to properly limiting the death sentence to "a small sub-class of capital-eligible cases," such a system suitably guides and directs the juries' discretion and minimizes the "chance of arbitrary application of the death penalty." Pulley v. Harris, 465 U.S. at 53.

ii. Eighth Amendment Analysis

In a strikingly similar case, the Sixth Circuit concluded that the State violated the Eighth Amendment when it failed to charge the defendant in the indictment with the aggravating circumstance for which the death penalty was imposed, it failed to instruct the jury on the aggravating circumstance, and the jury failed to reach a verdict on the existence of the aggravating circumstance. Esparza v. Mitchell, 310 F.3d 414, 417 (6th Cir. 2002). While the United States Supreme Court reversed the Sixth Circuit in Esparza, the Supreme Court did not conclude that there was no Eighth Amendment violation but rather held that the Sixth Circuit erred in not subjecting the violation to a harmless error analysis. Mitchell v. Esparza, 540 U.S. 12, 16-17 (2003). Because Esparza was the "only defendant charged in the indictment" and there was "no evidence presented that anyone other than respondent was involved in the crime," the United States Supreme Court found harmless the State of Ohio's failure to charge Esparza in the indictment as the principal offender in the commission of the aggravated murder and the trial court's related failure to instruct the jury that it must make a finding on whether he was the principal offender. Since Esparza was the only possible offender, a jury verdict that Esparza committed the aggravated murder while committing the aggravated robbery implicitly included a finding that he was the principal offender in the commission of the aggravated murder. For Esparza, the principal offender language was of no consequence.

While Joseph's case involves essentially the same errors present in Esparza, in his case, the errors are far from harmless. Here, as in Esparza, the indictment failed to charge the defendant with the aggravating circumstance for which the death penalty was ultimately imposed and the judge failed to instruct the jury properly on the aggravating circumstance. Such a situation, notwithstanding the correctly phrased jury verdict form, permits the death penalty to be imposed in an arbitrary and capricious manner violative of the principles enunciated in Furman, Gregg, Zant, and Lowenfield. Given the flawed indictment and the improper instructions, the State in this case did not follow a capital scheme designed to ensure that the jury's "discretion [is] suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg, 428 U.S. at 189. On the contrary, the State told the jury one thing and asked it to find another, creating unacceptable uncertainty as to whether the aggravating circumstance, as specified by Ohio law, was indeed found by the jury. Unlike Esparza, such a result is not harmless because, as the State readily conceded at trial, either Joseph or Bulerin could have been the actual killer.

In complying with constitutional mandates, Ohio has enacted legislation to narrow the application of its death penalty and to ensure that death sentences are not imposed in an arbitrary and capricious manner. In order for death sentences to pass constitutional muster, the state must actually act consistently with this legislation. In so muddling the aggravating circumstance tried to the jury, one cannot be sure that the jury found Joseph to be the principal offender in the commission of the aggravated murder. Such a result runs afoul of the Constitution's capital sentencing narrowing requirement imposed by the Eighth Amendment because it fails to suitably constrain the jury's discretion and fails to adequately minimize the risk of an arbitrary death sentence.

8. Cumulative Error: Twentieth Ground For Relief

Because this Court found that Mr. Joseph was entitled to relief on other specific constitutional grounds, it need not address Mr. Joseph's twentieth ground for relief which contends that, even if no particular error entitled him to relief, the "totality of these constitutional violations and cumulative affect [sic] rendered these proceedings fundamentally unfair and violated rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution." (Docket #83, at 136-37). In a pre-AEDPA case, the Sixth Circuit did hold that errors which do not constitute a deprivation of due process standing alone "may cumulatively produce a trial setting that is fundamentally unfair." Walker v. Engle, 703 F.2d 959, 963 (6th Cir. 1983); see also Cooper v. Sowders, 837 F.2d 284, 286 (6th Cir. 1988). However, more recently the Sixth Circuit has concluded that, since the Supreme Court has not held that "distinct constitutional claims can be cumulated to grant habeas relief," Ohio court judgments refusing to find such a cumulative error can not be considered contrary to Supreme Court decisions so as to warrant habeas relief. Baze v. Parker, 371 F .3d 310, 330 (6th Cir. 2004); Lorraine v. Coyle, 291 F.3d 416,447 (6th Cir. 2002); Scott v. Elo, 302 F.3d 598, 607 (6th Cir. 2002).

III. CONCLUSION

Upon full review of the record and for the reasons discussed above, this Court grants in part and denies in part Mr. Joseph's petition for a writ of habeas corpus. Specifically, the Court grants Mr. Joseph's petition as to his first and second grounds for relief as well as portions of his eighth and nineteenth grounds for relief, but denies his petition with respect to his remaining grounds for relief. Mr. Joseph has established that Ohio state courts unreasonably applied clearly established federal law in finding that the indictment provided him with sufficient notice of the death

penalty specification on which he was ultimately convicted (ground one), that the related erroneous jury instructions did not violate his due process rights (ground two), that he received constitutionally effective assistance of counsel (ground eight), and that he was sentenced to death based on a sufficiently narrow, constitutional death penalty scheme (ground nineteen). Moreover, Mr. Joseph's motion to expand the record is granted, but his motion for an evidentiary hearing is denied. As "death as a punishment is unique in its severity and irrevocability," courts must be "particularly sensitive to insure that every safeguard is observed." Gregg, 428 U.S. at 187. This case involved a fundamental breakdown in the processes established to ensure the reliability of the death sentence imposed on Mr. Joseph. After receiving faulty notice of the crime charged, the State presented its case against Mr. Joseph on an errant theory consistent with the faulty indictment and the jury received contradictory jury instructions on what was necessary to find Mr. Joseph guilty of the death penalty specification. These errors were compounded by the failure of the adversarial process as Mr. Joseph's attorneys' did not notice and/or object to the faulty indictment and erroneous jury instructions and failed to put the State to its burden of proving the death penalty specification. Ultimately, Mr. Joseph was convicted of a specification not charged in the indictment. Given the critical errors infecting the process by which Mr. Joseph was found guilty of the death penalty specification, this Court lacks confidence in his sentence of death. The Constitution does not permit a person to be sentenced to death on a basis not charged, which was not argued to the jury, and about which the jury received conflicting instructions.

Accordingly, this Court issues a writ of habeas corpus ordering that Mr. Joseph's death sentence be set aside and that he be re-sentenced according to the statutory guidelines for aggravated murder in the absence of a capital specification, as set forth in O.R.C. § 2929.03(A), which

mandates a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment. Unless Mr. Joseph is re-sentenced within 180 days from the effective date of this Order, the respondent shall release him from custody. On this Court's own motion, execution of this Order and hence, its effective date, is stayed pending appeal by the parties.

IT IS SO ORDERED.

/s/ LESLEY WELLS
UNITED STATES DISTRICT JUDGE
12-22-04

FEB 12 2007

No. 06-961 CAPITAL CASE

Supreme Court of the United States

MARC HOUK, WARDEN,
Petitioner

v.

RICHARD JOSEPH,
Respondent

On Petition For A Writ of Certiorari To The United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

EDMUND W. SEARBY
Counsel of Record
JENNIFER L. CUPAR
SCOTT + SCOTT, LLP
33 RIVER STREET
CHAGRIN FALLS, OH 44022
(440) 247-8200

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

(Capital Case)

I. In granting habeas corpus relief, did the Sixth Circuit misapply settled rules that limit its role and authority and erroneously set aside reasonable state-court determinations of fact?

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STATEMENT OF THE CASE

Respondent Richard Joseph ("Joseph") incorporates by reference the statement of facts and procedural background in part I of the opinion below, as well as the recitation of facts found at the beginning of part III of that opinion. *Joseph v. Coyle*, 469 F.3d 441, 445-49, 450-53 (6th Cir. 2006), Apx. at 3a-9a, 13a-19a.

In that opinion, the Sixth Circuit affirmed the district court's grant of the writ of habeas corpus. The Warden now files this petition for a writ of certiorari. For the reasons that follow, this Court should deny the petition.

REASONS FOR DENYING THE WRIT

The Warden's petition for a writ of certiorari fails to identify any compelling reason for this Court to grant the writ. The Warden does not identify any important federal question in need of resolution by this Court. Nor does the Warden claim there is any conflict – important or otherwise – between this case and any decision of any other United States court of appeals. To the contrary, as stated in his question presented, the Warden claims that "the Sixth Circuit misapplied settled rules . . . and erroneously set aside reasonable state-court determinations of fact." Petition at i. As stated in Supreme Court Rule 12, this Court "rarely" grants certiorari for such reasons.

This is not the appropriate case to grant a petition for writ of certiorari on such a basis. The Warden tries to dress up his issues in terms of a federal court exceeding its authority, but the Warden cannot even show that this case was wrongly decided, much less an abuse of authority. Richard Joseph was tried on the mistaken belief that he could be sentenced to

death regardless of whether the State proved that he actually killed the victim. The result is that Richard Joseph was sentenced to death for a charge never made, tried, or proven. Four federal judges to review this case all agreed that under clearly established federal law this death sentence cannot stand. It is remarkable that the State is still trying to reinstate a death sentence unconstitutionally wrought from its own errors.

A. THE SIXTH CIRCUIT RIGHTLY HELD THE EVIDENCE WAS INSUFFICIENT TO PROVE JOSEPH WAS THE PRINCIPAL OFFENDER.

The Warden argues that the Sixth Circuit erred in granting relief for insufficiency of the evidence. Petition at 9. The Warden does not contend that there is any question of federal law that requires this Court's resolution. Instead, the Warden claims that the Sixth Circuit misconstrued Ohio law to require specific proof that Joseph actually killed the victim. This argument does not provide a reason for this Court to grant certiorari.

The Warden tries to inflate the issue into a claim that a federal court exceeded its authority. This is not the case. The Due Process Clause of the United States Constitution "forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Fiore v. White*, 531 U.S. 225, 228-29 (2001); *accord, Jackson v. Virginia*, 443 U.S. 307, 309 (1979); *In re Winship*, 397 U.S. 358 (1970). Under clearly established Supreme Court precedent, a federal court presented with a Due Process sufficiency of the evidence claim must determine whether "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Jackson v. Virginia, 443 U.S. at 319. This is what the Sixth Circuit did. The Warden does not contend that the Sixth Circuit misstated the *Jackson* standard of review or otherwise misconstrued federal constitutional requirements. The Warden's real complaint is that the Sixth Circuit misconstrued the elements of the offense under State law. *See* Petition at 12 ("the elements of a criminal offense...remain a question of state law"). This argument not only fails to provide a basis why this Court should grant certiorari, it is simply incorrect.

Unlike *Bradshaw v. Richey*, 546 U.S. 74 (2005), which the Warden cites, the Sixth Circuit in this case correctly interpreted and faithfully applied Ohio law in deciding this case. The Ohio principal offender specification that ultimately went to the jury requires proof that the defendant was "the actual killer." *See Mitchell v. Esparza*, 540 U.S. 12, 18 (2003); *State v. Penix*, 32 Ohio St. 3d 369, 513 N.E. 2d 744, 746 (1987). Ohio courts have interpreted the "actual killer" to mean that the defendant "personally performed every act constituting the offense of aggravated murder." *State v. Sneed*, 63 Ohio St. 3d 3, 584 N.E. 2d 1160, 1168 (1992); *see also*, *Joseph v. Coyle*, 469 F.3d 441, 454 (6th Cir. 2006) (for state cases cited therein), Apx. at 20a-21a.

Accordingly, to convict Richard Joseph of the death penalty specification, the State needed to prove beyond a reasonable doubt that Richard Joseph actually killed the victim. This the State did not do, much less understand. As the Sixth Circuit rightly notes, the State conceded in its closing argument that it did not know who actually killed the victim: "The State of Ohio can't tell you. I wish I could. I wish I could tell you exactly what happened. I don't know who struck the death blow." 11 J.A. at 3907 (Trial Tr. at 1976). Consistent with the State's repeated admissions that it

did not know, much less could prove, who actually killed the victim, the State did not offer any such proof. The Warden once again provides a list of circumstantial evidence relevant to liability for aggravated murder in general, but none of this evidence goes to prove the principal offender specification, that is, that Joseph was the actual killer. We are left, as the prosecutors repeatedly admitted at trial, without knowledge as to who actually killed the victim.

The Warden no longer strenuously argues that any of the evidence cited proves Joseph actually killed the victim. Instead, the Warden argues that there is no support in Ohio case law for the Sixth Circuit's conclusion that "when the defendant and a coconspirator are present at the time and place of the murder, there must be evidence that the defendant struck the fatal blow(s)." *Joseph*, 469 F.3d at 455, Apx. at 22a. This is incorrect. The Sixth Circuit's interpretation is plainly supported in the requirement that the defendant be shown to be the "actual killer."[1] More specifically, the Sixth Circuit rightly cites to *State v. Taylor*, 66 Ohio St. 3d 295, 612 N.E. 2d 316 (1993), in support of this proposition.

In *Taylor*, the Ohio Supreme Court overturned the defendant's conviction on the same principal offender specification at issue here where the State failed to put the issue to the jury and where "there [was] no evidence that [Taylor] was the principal." 612 N.E.2d at 325. In finding insufficient evidence, the Ohio Supreme Court highlighted the evidence implicating Taylor's co-defendant and the lack of any "evidence to the contrary." *Id.* The Ohio Supreme

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[1] It would be illogical and unconstitutional to dispense with the required proof because more than one individual is involved, and the Warden cites no cases to support such an exception.

Court then held that "while Taylor can be convicted of aggravated murder...without being the actual killer, but by aiding and abetting the actual killer, that finding cannot be bootstrapped into a finding that he is the principal offender for purposes of receiving the death penalty...." *Id.* Accordingly, *Taylor* supports the Sixth Circuit's reading of Ohio law that in a case with multiple defendants, the principal offender specification required proof that Joseph was the actual killer.

In sum, the Sixth Circuit rightly decided that the Ohio Supreme Court majority opinion unreasonably denied Joseph's insufficiency of the evidence claim.[2] The Sixth Circuit's decision is based on a correct application of federal and state law to the facts. In any event, none of this states a valid reason why this Court should revisit this case.

B. THE SIXTH CIRCUIT PROPERLY HELD JOSEPH'S DEATH SENTENCE VIOLATED THE EIGHTH AMENDMENT'S NARROWING REQUIREMENT.

Because Joseph was not charged or tried pursuant to a correct capital specification, his death sentence violated his rights under the Eighth Amendment. The Sixth Circuit's decision affirming the District Court's grant of the writ on this claim correctly stated and applied the law, and no compelling reason exists to grant the Warden's petition for a writ of certiorari.

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[2] Three Ohio Supreme Court justices, including the Chief Justice, also found the evidence insufficient to convict Joseph of the capital specification.

The Warden now challenges this decision to a limited degree. In the Sixth Circuit, however, the Warden argued only that the Eighth Amendment claim was procedurally defaulted, and never challenged the District Court's decision on the merits. This Court has repeatedly declined to address arguments not raised in the appellate court. *See, e.g., U.S. v. Bean*, 537 U.S. 71, 74 n.2 (2002) ("That claim, however, is waived, as respondent raised it for the first time in his brief on the merits to this Court."); *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 432 (1999) ("Respondent advanced this argument for the first time in his Brief in Opposition to Certiorari in this Court . . . having failed to raise it before either the BIA or the Court of Appeals. We decline to address the argument at this late stage."). And while the Sixth Circuit chose to address the substance of the Eighth Amendment issue, the Warden's complaints with that decision should be viewed in the context that the Sixth Circuit did not need to even address the issue on the merits.

In any event, the Warden raises no important issue as to the merits of the Eighth Amendment claim. The Warden does not contend that the Sixth Circuit's decision conflicts with any decisions of this Court or with any decisions of other federal courts of appeals. The Warden does contend that "the Sixth Circuit relied *solely* on its prior decision in *Esparza v. Mitchell*," and suggests that the Sixth Circuit did not base its Eighth Amendment claim on clearly established law. Petition at 13 (emphasis added). This is not accurate.

The Sixth Circuit began its analysis with an extensive quote from *Lowenfield v. Phelps*, 484 U.S. 231 (1988), which summarizes the Eighth Amendment's narrowing requirement. *See Joseph v. Coyle*, 469 F.3d at 457, Apx. at 25a. Specifically, the Sixth Circuit recognized this Court's clearly established Eighth Amendment requirement that "a

capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Id.* (quoting *Lowenfield*, 484 U.S. at 244 (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983))). The Sixth Circuit further noted that "'statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.'" *Id.* (quoting *Lowenfield*, 484 U.S. at 244 (quoting *Zant*, 462 U.S. at 878)).

The Warden's suggestion that the Sixth Circuit did not rely upon clearly established law is thus unfounded. The Sixth Circuit correctly applied the principles of *Lowenfield* and *Zant* to affirm the District Court. The Warden offers no argument to the contrary. The Warden does cite to Justice Scalia's concurrence in *Ring v. Arizona*, 536 U.S. 584, 612 (2002), but that decision does not support that the result in this case is somehow not clearly established in the decisions of this Court. In *Ring*, Justice Scalia explicitly stated that "wherever [aggravating] factors exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 612 (Scalia, J., concurring). That did not happen in this case. The gross error in this case relieved the jury of finding beyond a reasonable doubt an essential element of the capital offense. This essential element – whether the defendant actually killed the victim – obviously functions to narrow the class of persons subject to execution.

Nor does the Warden demonstrate that the Sixth Circuit improperly – any more than it "solely" – relied upon its decision in *Esparza v. Mitchell*, 310 F.3d 414 (6th Cir. 2002),

rev'd and remanded, *Mitchell v. Esparza*, 540 U.S. 12 (2003). In *Esparza*, the Sixth Circuit granted relief because the State failed to charge and try to the jury the same principal offender specification at issue here. The court held that such an error is not subject to harmless error review. As the Sixth Circuit recognized in this case, this Court reversed the Sixth Circuit's decision in *Esparza* because an Eighth Amendment violation is subject to harmless error analysis. The Sixth Circuit decision in this case correctly notes that "[t]he Supreme Court did not disturb our conclusion that a constitutional violation occurred." *Joseph*, 469 F.3d at 458, Apx. at 27a. The Warden disputes that reading, arguing that a single sentence about the Sixth Circuit failing to cite or apply 28 U.S.C. § 2254(d) equates to a failure to find an Eighth Amendment violation. Read in context, this Court's reference to the requirements of § 2254(d) relates only to the harmless error issue. *Esparza*, 540 U.S. at 15-16. It is clear from the opinion that this Court agreed with the Sixth Circuit, or at a minimum did not question, that a constitutional violation had occurred. *See id.* at 16-17 ("We cannot say that because *the violation* occurred in the context of a capital sentencing proceeding that our precedent requires the opposite result [preclusion of harmless error review].") (emphasis added).

Moreover, in addition to referencing its own opinion, the Sixth Circuit correctly read and properly relied upon this Court's holding in *Mitchell v. Esparza*, 540 U.S. 12, to affirm relief in this case. While this Court found the failure to charge and try the principal offender specification in *Esparza* to be harmless, this Court's reasoning demonstrates that the violation in this case was indeed harmful. In finding the violation harmless in *Esparza*, this Court relied exclusively on the fact that only Esparza was indicted for the crime and that there was no evidence of anyone else's participation in

the murder.[3] As this Court stated, "[A]fter all [Esparza] was the only defendant ~~charged~~ in the indictment. There was no evidence presented that anyone other than respondent was involved in the crime or present at the store." 540 U.S. at 18. In this case, where the State theorized that Bulerin and Joseph were involved in the murder and offered evidence to implicate both, the failure to charge and properly try to the jury the issue of who was the principal offender ("actual killer") was not harmless error. The Sixth Circuit therefore rightly relied upon this Court's reasoning in *Mitchell v. Esparza* in finding that the violation was indeed harmful.

Accordingly, because the Warden identifies no colorable legal error, this Court should deny the Warden's petition for a writ of certiorari on this claim.[4]

C. THE SIXTH CIRCUIT PROPERLY HELD JOSEPH'S TRIAL COUNSEL WAS INEFFECTIVE, CONSTITUTING CAUSE AND PREJUDICE TO EXCUSE ANY PROCEDURAL DEFAULT.

The Sixth Circuit correctly stated and applied *Strickland v. Washington*, 466 U.S. 668 (1984), in unanimously holding that trial counsel's failure both to understand the elements of the offense with which the State intended to charge Joseph and to hold the State to charging and proving those elements

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[3] This Court expressly declined to consider new "evidence brought to light for the first time in the habeas proceeding in the District Court that suggested there might have been another participant in the crime." *Esparza*, 540 U.S. at 18 n.3.

[4] In addition, the Warden's challenge to the Eighth Amendment finding is not even outcome determinative for this case. Joseph also challenged the defective indictment on due process grounds, and the Warden does not challenge the grant of relief on that basis.

caused any alleged procedural default and prejudiced the outcome of Joseph's proceedings.[5] Once again, by arguing that the Sixth Circuit merely reached the wrong decision, the Warden does not identify a single issue that could have any bearing on future cases. As there is no error to correct and no question of larger public importance, this Court should deny the Warden's petition on this basis.

The Warden does not contest the Sixth Circuit's conclusion that ineffective assistance of counsel constitutes cause and prejudice to excuse a procedural default.[6] The Warden also does not dispute that trial counsel performed deficiently in failing to even understand the statutory capital specification that should have determined whether his client lived or died. The Warden's argument rests entirely on the Sixth Circuit's application of the *Strickland* prejudice prong to the particular circumstances of this case.

Relying on *Strickland*, the Sixth Circuit explained that the prejudice component requires the defendant to "show 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Joseph v. Coyle*, 469 F.3d at 459 (quoting *Strickland*, 466 U.S. at 694), Apx. at 29a-30a. It further explained that "[a] reasonable probability is less than

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[5] The District Court also found that trial counsel's ineffective assistance amounted to cause and prejudice. Apx. at 151-54.

[6] *See Joseph*, 469 F.3d at 459 (noting that *Murray v. Carrier*, 477 U.S. 478 (1986), and *Edwards v. Carpenter*, 529 U.S. 446 (2000), hold ineffective assistance of counsel constitutes cause for a procedural default), Apx. at 28a; *id.* at 462 (relying on *Banks v. Dretke*, 540 U.S. 668, 691, 698 (2004), *Strickler v. Greene*, 527 U.S. 263, 282 (1999), *Kyles v. Whitley*, 514 U.S. 419, 433 (1995), and *Strickland*, 466 U.S. at 694, in holding that proving the prejudice prong of *Strickland* establishes the prejudice prong of cause and prejudice), Apx. 34a-35a.

a preponderance of the evidence, as 'a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. . . . Instead, '[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 693-94), Apx. at 30a.

The Sixth Circuit found the prejudice inquiry "straightforward." *Id.* at 462, Apx. 33a. Without question, a reasonable probability exists that the result of the *Joseph* proceedings would have been different if counsel had understood the elements of the capital specification under which Joseph was ultimately sentenced to die. If defense counsel had held the State to proving the elements of the valid specification (that Joseph was "the actual killer"), there is a more than reasonable probability that the jury would have acquitted Joseph of the specification. After all, the State repeatedly admitted that it did not know, much less could prove who actually killed the victim. *See, e.g.*, 11 J.A. at 3907 (Trial Tr. at 1976); 11 J.A. at 3973 (Trial Tr. at 2042). And, there is at least a reasonable probability that had defense counsel informed the court of the law's true requirements, the trial judge would have set aside the verdict or rejected the jury's recommendation.

The Warden primarily takes issue with the Sixth Circuit's decision because he believes the court "ignored" what the Warden characterizes as "the pivotal, factual findings of the Supreme Court of Ohio relevant to the possible effect of the defective specification and the corresponding jury instructions." Petition at 17. The Warden's argument fails for at least three reasons.[7]

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[7] Of course, to the extent the Warden implies any state court determination that Joseph was not prejudiced is a "factual finding," that is

First, the Ohio Supreme Court did not address Joseph's ineffective assistance claim. The portion of the opinion to which the Warden refers is the court's plain error analysis of Joseph's defective indictment claim. The plain error standard is a much higher standard than *Strickland's* prejudice prong – plain error requires the defendant to show that but for the error the outcome *would have been* different, not simply a reasonable probability of a different outcome. *State v. Joseph*, 73 Ohio St. 3d 450, 457 (1995).

Second, the Ohio Court of Appeals, the last state court to issue a reasoned opinion on Joseph's ineffective assistance claim, did *not* rely on the underlying facts the Warden cites – that the jury form correctly stated the capital specification, that the trial court read the correct language to the jury, and that the jurors signed the verdict form. Petition at 17. It did not cite a single one of these facts in its analysis of Joseph's ineffective assistance of counsel claim and, in fact, did not even address the prejudice prong with respect to counsel's failure to object to the indictment.[8] *State v. Joseph*, 1993 WL 531858, at *26 (Dec. 23, 1993). As the Sixth Circuit correctly recognized, under *Wiggins v. Smith*, a federal habeas court's "'review is not circumscribed by a state court

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incorrect. As this Court noted in *Strickland*, "a state court conclusion that counsel rendered effective assistance [i.e., that counsel's performance was not deficient and/or did not prejudice the defendant], is not a finding of fact binding on the federal court." 466 U.S. at 698.

[8] In analyzing Joseph's erroneous jury instruction claim, the Ohio Court of Appeals did mention that the trial court read the verdict form with the correct specification to the jury and that the jury signed the verdict form. *State v. Joseph*, 1993 WL 531858, at **13-14. Like the Ohio Supreme Court, however, it addressed these facts in the course of a plain error analysis. *Id.* In any event, it did not rely on either fact in its fleeting analysis of the prejudice prong of Joseph's ineffective assistance of counsel claim.

conclusion with respect to prejudice'" where the state court did not reach this prong of the analysis. *Joseph v. Coyle*, 469 F.3d at 460 n.14 (quoting *Wiggins*, 539 U.S. 510, 534 (2003)), Apx. at 30a-31a.[9]

Third, and perhaps most importantly, the Sixth Circuit did not ignore these facts. To the contrary, it acknowledged that "the [trial] court once read from the verdict form, which included a correct version of the specification." *Id.* at 452, Apx. at 17a. Nevertheless, considering the context of this entire case – from the charging document through the close of the mitigation phase – the finding of prejudice is the only reasonable decision.

The Sixth Circuit accurately relied on the following unassailable facts in the guilt phase of Joseph's trial in concluding that trial counsel's failure to understand the specification prejudiced Joseph: (1) the indictment did not charge that Joseph was the principal offender in the aggravated murder, *id.* at 451, Apx. at 14a-15a; (2) the State told the jury several times in its opening statement and rebuttal that the capital specification was the kidnapping, *id.*, Apx. at 15a-16a; (3) the State admitted that it could not prove Joseph was the actual killer, *id.* at 452, Apx. at 16a; (4) in closing, the State wrongly told the jury that this shortcoming did not matter, *id.*; (5) the court incorrectly instructed the jury that the specification required that Joseph be the principal offender in the commission of the kidnapping and several times referred to the specification "in the indictment," *id.*, Apx. at 17a; and (6) the court never instructed the jury that the principal offender provision of the specification requires the State to prove the defendant actually killed the victim, *id.*

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[9] Regardless, Joseph's claim succeeds under AEDPA review. *Joseph*, 469 F.3d at 460 n.14, Apx. 31a.

The Sixth Circuit also relied on the following facts from the mitigation phase: (1) the trial court again referred to the specification as the kidnapping, *id.* at 453, Apx. at 18a; (2) the State equated the aggravating circumstance with the kidnapping in its closing and rebuttal arguments, *id.*; (3) in its instructions, the court referred to the specification "in the indictment" and "consistently used some version of the phrase 'the aggravating circumstance which the defendant was found guilty of committing," which was also used in the verdict form, thereby incorporating the erroneous version into the instructions and verdict form, *id.*; (4) Joseph's counsel referred to the specification as the kidnapping three times in his opening argument and twice in closing, *id.*, Apx. at 18a-19a; and (5) during the trial court's independent review, both Joseph's counsel and the trial court referred to the aggravating circumstance of kidnapping, *id.*, Apx. at 19a.

The Warden acknowledges that "[i]t is possible that the jury might have found that Joseph was not a principal offender in the aggravated murder, had the instructions on this point been clearer." Petition at 18. Still, he fights to uphold the verdict, arguing that this is not a case "dependent on the jurors' interpretation of ambiguous instructions." *Id.* The Warden is correct that this is not a case where the jurors were required to interpret an ambiguous instruction – a verdict in a case like that would be worthy of *more* confidence than the verdict the Warden is asking this Court to uphold. Here, the Warden's argument is dependent on the jurors knowing that the offense for which Joseph was sentenced to die required the State to prove he was the actual killer, when the court never gave them such an instruction and the State told the jury it was not required to prove that. 11 J.A. at 3973 (Trial Tr. at 2042). It is inconceivable that the jury somehow divined that the law required it to find the

capital specification even though the State, the defense counsel, and the trial court did not know what the law required. The jury's verdict, despite the absence of any proof as to who was the actual killer, only reinforces that it did not understand the State's burden.

In sum, Richard Joseph's trial counsel failed to object at any of the many points where the State and the trial court misinstructed the jury as to the law's requirements. Indeed, counsel exacerbated the error through his own arguments. Nor did trial counsel insist that the jury be instructed that "principal offender" under Ohio law means the "actual killer." Moreover, counsel did not make the simple dispositive argument that, as even the State did not know who actually killed the victim, Richard Joseph could not be convicted of the capital specification. In short, counsel's ignorance of the law relieved the State of proving the capital crime, and allowed his client to be sentenced to death for a charge never fairly presented to the jury. Prejudice is undeniable, and a contrary finding would be plainly unreasonable.

In any event, these arguments relate only to the facts of this particular case and present no unresolved issue of greater importance. Even if this Court were inclined to take cases where the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law, the decision in this case is clearly correct. For these reasons, the Court should deny the State's petition on this basis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

EDMUND W. SEARBY
Counsel of Record
JENNIFER I. CUPAR
SCOTT + SCOTT, LLP
33 RIVER STREET
CHAGRIN FALLS, OH 44022
(440) 247-8200

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No. 06-961

In the Supreme Court of the United States

MARC C. HOUK, Warden,

Petitioner,

v.

RICHARD JOSEPH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

MARC DANN
Attorney General of Ohio

ELISE PORTER
Acting Solicitor General
STEPHEN P. CARNEY*
**Counsel of Record*
ELIZABETH T. SCAVO
Deputy Solicitors
CHARLES L. WILLE
Assistant Attorney General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Petitioner

REPLY BRIEF FOR PETITIONER

Nothing in Joseph's brief in opposition to certiorari review explains away the Sixth Circuit's mistakes in affirming the district court's grant of the habeas writ. On the contrary, Joseph's brief confirms the need for reversal.

The facts surrounding the Warden's petition are not complicated. Richard Joseph and Jose Bulerin were jointly charged with kidnapping and murdering Ryan Young. Under Ohio law, purposefully killing the victim during a kidnapping is aggravated murder and a separate basis for imposing a death sentence. The death penalty specification under which Joseph and Bulerin were indicted mistakenly alleged that the defendants were principal offenders in the kidnapping, as opposed to principals in the murder. Nevertheless, Joseph did not object to the indictment or to the jury instruction that repeated the specification's mistaken language. The jury found Joseph guilty of the charge and specification, and all twelve jurors signed a verdict form stating that Joseph was the principal offender in the aggravated murder.

The Warden's petition presents a straightforward argument: The Sixth Circuit exceeded its authority in granting habeas corpus relief to Joseph, because Joseph's challenges to the indictment and instruction were procedurally defaulted; and because, in excusing Joseph's default, the Sixth Circuit ignored the factual findings underpinning the state court's conclusion that Joseph could not have been prejudiced, in view of the jury's unanimous finding that he was a principal offender in the aggravated murder. In granting relief on Joseph's insufficiency-of-the-evidence and Eighth Amendment claims, the Sixth Circuit compounded its error by finding constitutional violations based on its own interpretation of Ohio law and on one of its own decisions that had been reversed by this Court.

None of Joseph's arguments in defense of the Sixth Circuit's decision succeeds. First, he argues that the Sixth

Circuit correctly granted relief on his insufficiency-of-the-evidence claim, see Brief in Opposition ("Opp.") at 2-5, because the Sixth Circuit's interpretation of Ohio law is "plainly supported," Opp. at 4. Joseph suggests that the Sixth Circuit simply applied state decisions that define "principal offender" as the "actual killer." But neither Joseph nor the Sixth Circuit cites any Ohio court decision that requires "proof that the defendant personally inflicted the death blows," see 6th Cir. slip op. at Appx. 24a, where the evidence also implicates a co-defendant. In any event, it is the Supreme Court of Ohio's interpretation of Ohio law—and not the Sixth Circuit's—that controls. The Supreme Court of Ohio held previously that there can be more than one "principal" or "actual killer" for the purposes of sustaining a capital specification, and, in Joseph's case, it held that a jury could reasonably find based on the evidence that Joseph actually killed Young. And the Supreme Court of Ohio's interpretation of Ohio law is binding. *Bradshaw v. Richey*, 546 U.S. 74, 126 S. Ct. 602, 604 (2005) (citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991)).

Neither the prosecutor's trial arguments nor state justices' dissenting opinions can support the Sixth Circuit's decision. Like the Sixth Circuit, Joseph attempts to buttress his arguments by pointing to the prosecutor's arguments at trial and the dissenting opinions of state justices. Opp. at 4, 5 & n.2. But like the Sixth Circuit, Joseph fails to cite any decision that equates argument with evidence. And Joseph ignores the distinction between the Supreme Court of Ohio's independent statutory review—which permits the reweighing of the evidence—and the stricter constitutional test for evidentiary sufficiency required by *Jackson v. Virginia*, 443 U.S. 307 (1979). A majority of the Supreme Court of Ohio concluded that the evidence in Joseph's case was sufficient under the *Jackson* standard. As the Warden previously noted, Chief Justice Moyer in dissent did not disagree with the majority's conclusion, but would have reversed the death

sentence based on his statutorily required independent review. *State v. Joseph*, 73 Ohio St. 3d 450, 470 (1995).

Joseph incorrectly maintains that the Warden waived his challenge to the "merits" of the Sixth Circuit's rulings. Opp. at 6. Procedural default is an adequate and independent ground of decision that precludes "merits" review of the petitioner's claims. *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997). Thus, by arguing before the Sixth Circuit that Joseph's procedural defaults precluded the district court's "merits" review of Joseph's claims, the Warden did not concede that the district court's merits review was substantively correct. Moreover, the Sixth Circuit addressed and affirmed on the "merits" the district court's grant of relief. It is well-established that the Court's practice permits review of any issue that has been passed upon by the lower court. See *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (collecting cases). Therefore, the "merits" of Joseph's claims are properly before the Court.

Moreover, the Warden cannot be faulted for contesting the district court's decision based primarily on Joseph's procedural default. Application of Ohio's contemporaneous objection rule is a plain procedural bar; it is a reasonable argument that the district court committed clear error in rejecting the Warden's default defense. See *Engle v. Isaac*, 456 U.S. 107 (1982). And Joseph's invocation of ineffective counsel as "cause and prejudice" to excuse his defaults necessarily required examination of the "merits" of the defaulted claims, to the extent that the "merits" could be relevant to a prejudice determination.

Joseph cannot escape the Sixth Circuit's improper reliance on a decision reversed by this Court. He disputes that the Sixth Circuit granted him relief based on its prior decision in *Esparza v. Mitchell*, 310 F.3d 414 (6th Cir. 2002). Opp. at 6. Yet the Sixth Circuit explicitly stated: "The thrust of Joseph's argument is that his case is materially

indistinguishable from *Esparza I*. We agree." 6th Cir. slip op. at Appx. 26a. Like the Sixth Circuit, Joseph attempts to resurrect the *Esparza* opinion after this Court reversed the grant of relief in that case. He repeats the Sixth Circuit's contention that the Court left intact the Sixth Circuit's underlying rationale for finding an Eighth Amendment violation. That argument misses the point completely. The Sixth Circuit's view that Esparza's Eighth Amendment rights were violated was irrelevant unless the state court's contrary view contravened or unreasonably applied this Court's decisions. *Mitchell v. Esparza*, 540 U.S. 12, 17 (2004). The Sixth Circuit did not address that question in *Esparza*, as "it failed to cite, much less apply," the standard of review required by 28 U.S.C. § 2254(d). 540 U.S. at 15.[1]

Further, Joseph errs in reading the Supreme Court of Ohio's opinion as failing to evaluate his ineffective assistance claim. He contends that the state court findings cited by the Warden are not relevant because they were made in the course of the state's plain error review, Opp. at 12-13, but Joseph's arguments cannot sidestep the clear import of the state court's decision: The verdict could not have been affected by the mistake in the indictment and instruction because the jury unanimously found that Joseph was a principal offender in the aggravated murder. See *Mitchell v. Esparza*, 540 U.S. at 15. And the Supreme Court of Ohio's decision, in summarily rejecting Joseph's ineffective-assistance-of-counsel claim, *State v. Joseph*, 73 Ohio St. 3d at 454-55, counts as an adjudication that is entitled to deference in federal habeas. See *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000) (noting circuits' agreement that deferential standard applies even where state court decides a

[1] Joseph argues that the Sixth Circuit's Eighth Amendment holding is not "outcome determinative," because it found a due process violation. Opp. at 9 n.4. The Warden also maintains, however, that the Sixth Circuit erred in rejecting the Warden's procedural default defense, which barred all of Joseph's constitutional challenges to the indictment.

constitutional issue without discussion); *Aycox v. Lytle*, 196 F.3d 1174, 1177-78 (10th Cir. 1999) (collecting cases).

Finally, Joseph ignores the implication of the Supreme Court of Ohio's holding that no plain error occurred. Because Joseph relies on his counsel's alleged ineffectiveness to excuse his procedural defaults, Joseph must show a reasonable probability that the jury would have found he was *not* the principal offender in the aggravated murder, had the jurors *not* been mistakenly instructed that they were required to find that he was the principal offender in the kidnapping. But, as the Supreme Court of Ohio found, despite this mistake the jurors *still* unanimously found that Joseph was the principal offender in the aggravated murder. It is reasonably probable, if not certain, that the mistaken language did *not* affect the jury's verdict.

In sum, the Court should grant the Warden's petition and summarily reverse the Sixth Circuit's decision.

Respectfully submitted,

MARC DANN
Attorney General of Ohio

ELISE PORTER
Acting Solicitor General
STEPHEN CARNEY*
**Counsel of Record*
ELIZABETH T. SCAVO
Deputy Solicitors
CHARLES L. WILLE
Assistant Attorney General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Petitioner